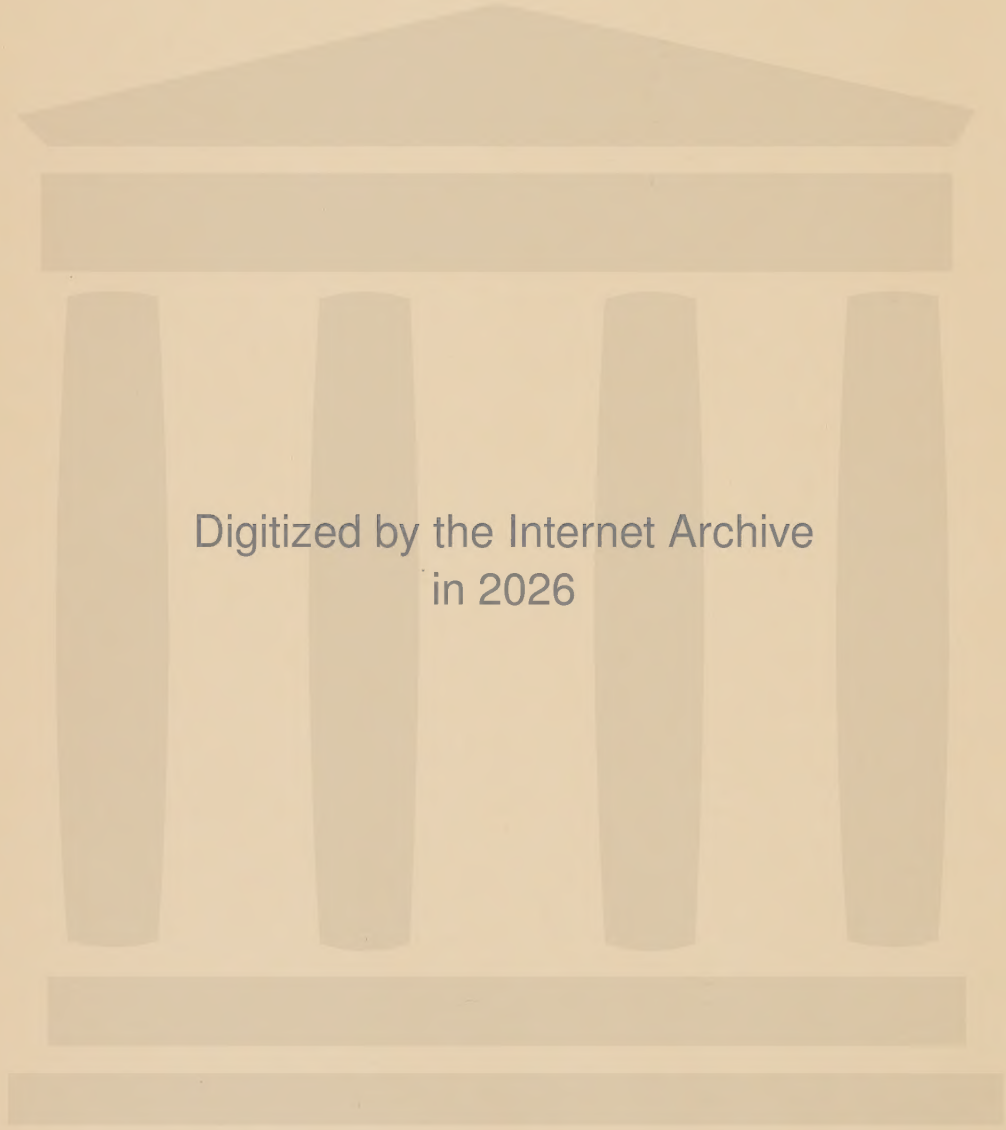
U. OF ARIZ. LAW LIB.


Digitized by the Internet Archive
in 2026

https://archive.org/details/albany-law-review_1938-1939_8

FOREWORD

This volume is an exact photo-reproduction of an original copy of

ALBANY LAW REVIEW

VOLUME 8

1938-1939

As an original is unobtainable, this re-print is offered to enable Law Libraries to fill out their collection of legal periodicals.

The reproduction follows the original (which is in mimeograph form) in every detail, and no attempt was made to correct errors and defects in typography.

January, 1953
Buffalo, N. Y. DENNIS & CO., INC.

UNIVERSITY OF ARIZONA
LIBRARY

THE ALBANY LAW REVIEW

of

RECENT DECISIONS

*
* *
*

Issued Quarterly

by

The Law Review Board of Albany Law School

VOLUME VIII No. 1 NOVEMBER, 1 9 3 8

defense counsel made a motion to dismiss the indictment for failure to prove the conspiracy charged in the indictment and because prosecution for the crime was barred by the statute of limitations. The court having denied the motion, Mr. Stryker was compelled to enter upon his client's defense.

One of the first important witnesses to be called by defense counsel Stryker to testify in behalf of Hines was Lyon Boston, an assistant in the office of former District Attorney, William C. Dodge. In answer to questions asked him by Mr. Stryker, the witness Boston testified that he had been commissioned by Dodge to investigate the policy racket, particularly the connection, if any, of Hines with policy. In describing his efforts while an assistant District Attorney to obtain indictments against those engaged in the policy racket the witness related how two newspaper reporters, Mefford and Mooney by name, had testified before the grand jury to the effect that Hines was in back of the policy racket. Mr. Boston then stated, "The testimony of Mooney, involving Hines was not, in my opinion, in any way sufficient to base an indictment." Certain members of the grand jury, however, felt otherwise, as appears from one of Mr. Boston's later statements made in an effort to explain the points of friction between his office and the grand jury. The witness testified: "The runaway episode took place in connection with the Hines - the Mooney testimony and the desire of certain of the grand jurors to indict Hines on such testimony." In fact, it was this disagreement between the District Attorney's office and the grand jury as to the sufficiency of the evidence on which to base an indictment of Hines together with the grand jury's insistence on subpoenaing witnesses without the consent of the District Attorney's office that resulted in what came to be known as the "runaway grand jury" and the ensuing appointment of Thomas E. Dewey as special rackets prosecutor. All these matters were testified to by Mr. Boston in considerable detail, and it is well to bear this in mind, since it is the basis of the District Attorney's contention that in describing what took place before the March Grand Jury of 1935, the defense opened wide the door for the cross-examination which followed.

In his cross-examination of Mr. Boston, District Attorney Dewey attempted to show that because of his inexperience in criminal investigation the witness was incompetent to carry out the task to which Dodge had assigned him, and that as a result, the whole policy investigation had been poorly handled. In his effort to prove that Dodge's office had deliberately whitewashed Hines in refusing to approve an indictment Mr. Dewey asked the following question: "The grand jury had its final split with Mr. Dodge and his office generally over his refusal to approve an indictment of Hines for inadequacy of evidence?" To which the witness answered: "I may have said such a thing. I don't believe I did." The testimony leading up to the fateful question then proceeds as follows:

Q- They told you frankly that they did not trust Mr. Dodge's office, didn't they? A- I think they didn't. Mr. Lee Thompson Smith may have said as much.

Q- He was the foreman of the jury? A- He was the foreman, yes.

Q- And they wanted Dodge's assistants out of the grand jury? A- When they were questioning certain witnesses.

Q- Yes, there was other testimony before the jury about Hines, wasn't there? Or at least other witnesses had mentioned his name at considerable length, hadn't they? A- Oh, yes, Mefford did and Mooney did. I don't know who else did.

Q- I understood you to say the only reason for the grand jury's desire to indict Hines was the Mooney testimony about Hines being in policy? A- I didn't mean to imply that.

Q- I did not think you did. A- There was other mention of Hines, but I felt that it was equally incompetent.

Q- William Fellowes Morgan, the Commissioner of Markets, discussed the subject at length in the grand jury, didn't he? A- I don't recall that.

Q- Don't you remember any testimony about Hines and the poultry racket there by him?

The witness never answered that question, because at its conclusion the defendant's counsel Mr. Stryker interjected:

"One moment, I move for a mistrial."

Then followed this colloquy between counsel for both sides and the court with respect to the motion for a mistrial.

Mr. Dewey- The subject was opened up by the defense, I believe.

Mr. Stryker- I move for a mistrial and the withdrawal of a juror.

Mr. Dewey- The subject was fully opened up by the defense.

The Court- No, there was no such subject opened up, and I think you should not refer to it in any way, shape or form.

After some further argument between court and counsel, immaterial for the purpose of this review, the court reserved decision on the motion and declared a recess.

Now the rule of evidence which caused Justice Ferdinand Pecora to declare a mistrial of the Hines case is so funda-

mental and so well established in American criminal jurisprudence that it cannot be presumed that District Attorney Dewey was unaware of it. Nor can it be supposed that a prosecutor of Mr. Dewey's experience and conceded ability would stumble into the violation of a legal rule so likely to result in a mistrial. In other words, it is logical to assume that Mr. Dewey had good reasons for thinking the question to be entirely proper.

Let us therefore turn to a closer examination of the record, and determine, if we can, just what Mr. Dewey's motive might have been in asking the question which proved to be his undoing. As explained by Mr. Justice Pecora in his ruling declaring a mistrial, "The question asked by the learned District Attorney of the witness Boston, which constitutes the immediate basis for the motion for a mistrail, is a question that carries with it an implication that during a grand jury investigation in the early part of the year 1935 in this county testimony was presented to that grand jury purporting to connect the defendant Hines - the defendant on trial in this action- with a so-called poultry racket.

"The motion for a mistrial is primarily based upon the well established rule or doctrine in our criminal jurisprudence that, upon the trial of a defendant charged with a specific crime, evidence may not be introduced purporting to show that the defendant had or may have committed other crimes. I know of no rule in our criminal jurisprudence that is more deeply rooted than that rule. The rule is of almost universal application and admits of very, very few exceptions."

Parenthetically, it may be observed, that the exceptions to the rule are well stated by the Court of Appeals in the case of People v. Molineaux, 168 N.Y.264, but since the exceptions are not in any way applicable to the question under review it is unnecessary to discuss them.

"The defendant claims upon this motionfor a mistrial that the question asked by the learned District Attorney of the witness Boston constitutes a clear violation of that rule, and hence entitles the defendant to a mistrial. The learned District Attorney has argued with the court, both in his written memorandum and in oral argument, that his question does not constitute a violation of the rule, that he was justified in asking the question because the subject to which the question alludes had been opened up by the defendant. The District Attorney further contends that he had a right to ask the question under the right which the law generally gives to a cross-examining counsel to impeach the credibility of a witness.

"The Court has read the minutes of the last session of the court in which this question was asked. Neither the reading of the minutes nor any recollection on the part of the Court, independently of the minutes, indicates that any question had been asked of the witness Boston by the defendant's counsel who put him on the stand as a witness for the defendant relating to the

defendant Hines and a so-called poultry racket. The record will be searched in vain for any reference to a poultry racket prior to the reference thereto embodied in the question of the District Attorney."

The Court is quite correct in its observation that prior to the District Attorney's question there had been no mention of Hines in connection with a poultry racket, as a reading of the record of the testimony of Mr. Boston will confirm. Mr. Boston had, however, testified that Mooney, a newspaper reporter, had given evidence to the effect that Hines was behind the policy racket, but Mooney's testimony had been largely hearsay and in the opinion of the District Attorney's office not sufficient to warrant an indictment. It was also a fact, although not brought out on Mr. Boston's direct examination, that William Fellowes Morgan, Commissioner of Markets, had given certain testimony before the same grand jury which tended to show that Hines had some connection withthe poultry racket.

Now District Attorney Dewey had had access to those grand jury minutes and knew that the Commissioner of Markets had given testimony before it. Mr. Boston on his direct examination had described at length what had happened before the grand jury, but had failed to mention any testimony by Commissioner Morgan. It was the District Attorney's contention therefore, that in detailing the evidence presented before the 1935 grand jury the witness had opened wide the door for the prosecution to examine him on his own testimony and to impeach him if it could. It was obviously with a view to discrediting Mr. Boston by showing that he had not told the whole story;that he had, either through inadvertence or design, neglected to mention the Morgan testimony that Mr. Dewey asked: "Don't you remember any testimony about Hines and the poultry racket there by him?"

Mr. Dewey was plainly within his rights as a cross-examiner in attempting to impeach the witness on his own testimony. The difficulty is that the question, according to the court's ruling, implied that the defendant had committed a crime for which he was not on trial. Whether the necessary implication of the question is that the defendant had committed another crime will be discussed at a later point.

But assuming, without conceding, that such is its necessary implication, the defendant's motion made it necessary for the trial judge to determine whether that implication was so prejudicial to the defendant's rights as to require the declaration of a mistrial. This is the really crucial question in the case, the determination of which rested solely in the sound discretion of the trial judge. Mr. Justice Pecora, fully aware of the responsibility thus suddenly thrust upon him decided the question in favor of the defendant. That the trial justice had authority to declare a mistrial is not open to question; the wisdom of his determination is, however, another matter.

Mr. Justice Pecora's critics contend that the proper thing for him to have done under the circumstances was, to request Mr. Dewey to withdraw the question, instruct the jury to disregard it, and allow the trial to proceed. Then, had it turned out that this was legal error, the defendant, if convicted, could have secured a reversal on appeal; in other words, Justice Pecora needlessly assumed sole responsibility for the determination of a question which he might well have referred to a higher court for review.

Anticipating such possible criticism, Justice Pecora has this to say: "The responsibility is now put upon this court as the trial justice in the case to determine on this motion for a mistrial whether the asking of the question by the District Attorney is in error or defect affecting the substantial rights of this defendant. If it is, and the conscience and the judgment of this court are clear upon it, this court should not shirk its duty or responsibility of making a decision in regard to its judgment and its conscience, and not pusillanimously pass the question on to a higher court."

Thus having satisfied his own conscience that he faces a question, the determination of which he cannot evade, Justice Pecora proceeds to fortify the decision he is about to announce with an imposing list of authorities. To attempt to review them all would prolong this discussion unnecessarily and serve no useful purpose. Suffice it to observe that they all, in varying language, reaffirm the proposition, already well established, that upon the trial of a defendant charged with a specific crime, evidence may not be introduced purporting to show that the defendant had or may have committed other crimes. There are, however, two cases which Justice Pecora cites in support of his decision which deserve to be mentioned; the first, because of its particular appositeness to the question under review, and the second, because of Justice Pecora's admission that it was the case which most strongly influenced his decision.

In the first case, that of People v. Richardson, 222 N.Y. 103, the defendant was convicted of the crime of keeping a disorderly house. During the trial the defendant did not take the witness stand nor by any testimony make his character an issue, yet the trial court upon the cross-examination of a witness, who was the housekeeper for the defendant at the hotel alleged to be a disorderly house, permitted the prosecution to elicit from the witness that she had been employed as a housekeeper at two other hotels operated by the defendant, which had been held to be disorderly houses, and for the keeping of which he had been sentenced to jail. The court held that the admission of such evidence was so prejudicial to the rights of the defendant as to require a reversal of the conviction.

The court reaffirms the general rule that "it is error to receive evidence upon the trial of an accusation of an offense other than that charged", and then cites Wigmore on Evidence,

Vol. 1 §§192, 193, 194 for the rationale of the rule. Professor Wigmore says: "The law here declares a general and absolute rule of exclusion," and for three reasons: "(1) the overstrong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped unpunished from other offenses; (3) the injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated."

The court in the Richardson case, supra, further elaborates the policy of the law in excluding such evidence by saying, "The reasons are rooted in practical policy, justice, and fairness. It is not a part of them that the proof they forbid is not relevant to the real issue, namely, is the defendant guilty or not guilty? Indeed, the exclusion is rather because they have an inescapable and a 100 percent relevancy. For reasons of policy and humanity, rather than of irrelevancy, is the evidence excluded.

"....The evidence was inadmissible not because it did not legitimately tend to prove an immoral and discredited character of the witness but because illegitimately and beyond obviation it would subject the defendant to the prejudice and injustice which the reasons declare and condemn. The wrong which would result from its illegitimate weight overbears its relevancy and suppresses its use for impeachment."

The court then sums up by saying: "I conclude it is a rule of law that an impeaching cross-examination of a witness for a defendant in a criminal trial cannot seek or adduce, for the purpose of discrediting the witness, testimony tending to prove that the defendant was of a criminal, degraded or bad character."

The second case is that of People v. Robinson, 273 N.Y. 483. There the defendant was charged with the larceny of certain stock or its proceeds. On the trial the District Attorney asked a witness by the name of Abramson, an attorney and the senior securities accountant of the Bureau of Securities: "Did you examine the books of the Robinson Corporation with reference to the Unanita B. Bates account?" To that question he gave the answer, "That was one of the various larcenies uncovered." The defendant's attorney promptly moved for a mistrial and to have the answer stricken out. The trial judge refused to grant a mistrial, but instructed the jury to disregard the answer to the question and allowed the trial to proceed. For the inadvertent admission of this highly prejudicial evidence the Court felt constrained to reverse the conviction. In reference to the trial judge's refusal to grant a mistrial the court makes the statements which, by Mr. Justice Pecora's own admission, influenced his judgment more than any other authority. These statements are, in part, as follows:

"Admonition to disregard evidence stricken out is easy to give and hard to follow.....The trial judge could not by admonition cause jurors to forget what they had been told, nor could he eradicate the impression that the defendant by objec-

tion, was successfully excluding proof that the defendant habitually committed larceny. It is impossible to say that it did not influence the verdict.

"Without fault of the trial judge, through the impossible perverse statement of a witness the defendant has been deprived of the right which we have said we must give to any defendant. When that occurred, there was no room for the exercise of discretion by the trial judge. In moving for a mistrial under these circumstances the defendant was vindicating a right, not asking for a favor."

Relying primarily upon People v. Robinson (supra) for his authority, Mr. Justice Pecora justifies his determination to grant the motion for a mistrial in the case before him in the following language:

"It is true that in the case at bar the witness Boston was not permitted to answer the question asked him by the District Attorney. The motion which counsel for defendant very promptly made upon the asking of the question cut off any answer which the witness might have made.

"The Court, however, cannot overlook the fact, in determining how much prejudice either wittingly or unwittingly may have been caused to this defendant by the asking of that question, that the question was asked by the learned District Attorney, a quasi-judicial officer, and that it was asked in a manner, taken in conjunction with the preceeding questions and answers of the witness on that cross-examination, that fairly tended to indicate and would inevitably tend to indicate to any court or jury hearing that testimony, that the question was asked, not as a shot aimed at a hidden target but was asked on the basis of some information in the possession of the District Attorney and conveyed to him by the grand jury minutes containing the testimony of Commissioner Morgan.

"This Court feels that very serious and fatally prejudicial error was caused to this defendant by the asking of that question. This Court feels that no amount of instruction, howsoever carefully phrased, and regardless of the amount of earnestness with which the Court could convey its instruction to the jury, could guarantee that this jury, composed as I believe it to be of men of intelligence, would literally follow that instruction.

"For these reasons the Court, with great regret on its part for the necessity which impels it to make this decision grants the motion for a mistrial and for the withdrawal of a juror."

Now if the question, "Don't you remember any testimony about Hines and the poultry racket there by him?" necessarily carries with it the implication that the defendant Hines had committed a crime, why then Mr. Justice Pecora was, under the authorities,

clearly justified in declaring a mistrial. The natural inference to be drawn from the question is that the testimony referred to did link Hines in some way with the poultry racket. But is anyone hearing that question justified in immediately jumping to the conclusion that his connection with the poultry racket, if any, was necessarily criminal?

In the two cases previously referred to the witnesses suggested that the defendant had committed acts which constituted crimes beyond any possibility of cavil; in the Richardson case the witness testified that she had been employed by the defendant at hotels which defendant had been convicted of operating as disorderly houses; in the Robinson case the witness testified that the larceny of which defendant stood accused was merely one of various larcenies uncovered. In each case the testimony of the witness necessarily carried with it the implication that the defendant had committed a crime other than that for which he was on trial.

Had Mr. Boston been allowed to answer the question put to him he undoubtedly would have explained that Commissioner Morgan's testimony before the grand jury was largely hearsay, and hence incompetent testimony on which to found an indictment. In other words, if the witness had been allowed to explain the nature of Mr. Morgan's testimony before the grand jury, might not the prejudicial effect of the question, standing by itself, been greatly lessened? Might not the inference well be that Hines had no criminal connection whatsoever with the poultry racket? And if the inference could legitimately be one of innocence as well as guilt, might not it then have been within the power of the trial judge to instruct the jury that they were not to consider the testimony as proof of the fact that Hines might have committed a crime in his possible connection with the poultry racket, but that they were to consider it as bearing solely upon the credibility of the witness?

Such instructions Mr. Justice Pecora felt were beyond his power to give or the jury to follow; and if he is correct in his judgment that the inescapable inference to be drawn from the question is that the defendant had committed a crime, it would undoubtedly have been improper for him to attempt to do so. The rule of law which forbids the admission of evidence tending to show the commission of crimes other than that for which the defendant is on trial is clear and well established. The difficulty arises when, as in this case, such evidence is inadvertently placed before the jury. Mr. Justice Pecora in the exercise of the broad powers of discretion intrusted to a trial judge charged with the duty of insuring to every defendant a fair trial has decided that the question asked by the District Attorney in the Hines case was so prejudicial to the substantial rights of the defendant as to require the declaration of a mistrial. Others in his place might have determined otherwise; but who can say that he was wrong?

HUGH ROSS ELWYN

TORTS - NEGLIGENCE - LIABILITY OF OWNER OF AUTOMOBILE FOR NEGLIGENT ACT OF DRIVER §59 VEHICLE AND TRAFFIC LAW

Under the common law the owner of an automobile was not liable for an injury caused by the driver's negligence if the driver was not in his employ or engaged in his business at the time of the accident. So it was held even though the owner was in the car when the collision occurred, where the wife was the owner of the automobile and the driver was employed by her husband. Potts v. Pardee, 220 N.Y.431.

The reason underlying the common law rule is the general one that a party injured by the negligence of another must seek his remedy against the person whose actual negligence caused the injury and that such person alone is liable. King v. N.Y.C.& H. R.R.Co., 66 N.Y.181. The case of master and servant was an exception to the general rule and the negligence of the servant was imputable to the master where the servant was doing the act which occasioned the injury and was at the time acting within the scope of his employment. This exception was based upon the fact that the servant was standing in the master's place and was acting for and representing him - since he must obey his orders. Engel v. Eureka Club, 137 N.Y.100.

This well founded salutary rule of agency, when applied to the operation of motor vehicles, became a social evil. Although not an inherently dangerous machine, the automobile in the hands of a negligent or incompetent driver becomes a public menace. The common law placed a tremendous burden upon the victim of the tortious driver. The owner of the motor vehicle could escape liability by asserting that the operator, although driving with permission, had either departed from the owner's business or was engaged in a frolic of his own. The liability of the owner was determined by rules of such difficult predictability as frolic and detour. Smith, Frolic and Detour, 23 Columbia Law Review 444. An example of the application of the detour rule is found in Schultze v. McGuire, 241 N.Y.460. The owner was sought to be held liable for an accident which happened during a deviation from the route the driver was instructed to take. To permit a recovery by the plaintiff, the court held that the employer was liable for damages caused by the negligence of the chauffeur if, at the time of the accident, the driver was taking the car back to the course he had been instructed to take; but not liable if the chauffeur was still proceeding away from the direct road upon his own business.

The court realized the remediless plight of the highway traveler, who was injured by a motor vehicle through the recklessness of an irresponsible driver to whom the owner had entrusted the vehicle and thereby made the accident possible, but

felt that it was helpless to alleviate the situation. "If contrary to ordinary rules, the owner ought to be responsible for the carelessness of everyone whom he permits to use it in the latter's own business, that liability ought to be sought by legislation as a condition of issuing a license rather than by some new or anomalous slant applied by the courts to the principles of agency." Van Blaricom v. Dodgson, 220 N.Y.111.

The New York statute by which it was attempted to correct the evils of the common law rule was enacted in 1924 as §282-e of the Highway Law, now §59 of the Vehicle & Traffic Law (Cons. Laws Ch.71). It reads: "Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle.....in the business of such owner or otherwise, by any person legally using or operating the same with the permission, expressed or implied, of the owner."

Liability became dependent no longer upon the use or operation of an automobile by a servant within the scope of his employment. Legal use or operation in the business of the owner or otherwise, with permission or consent, became the new test of civil responsibility. But the words of the statute, though seemingly simple enough, have been found to furnish an imperfect key to the solution of the many diverse factual situations that have arisen under it. The convenient generality of the statute has compelled the court to read into it the court's own interpretation of the Legislature's intent. This, perhaps, has lead to a narrower interpretation than a remedial statute deserves; yet, just how far the Legislature intended to go is a moot question. Out of a maze of many contradictory decisions of the inferior courts, the Court of Appeals has succeeded in developing a body of rules which will provide for most of the factual situations which may arise. These rules do not harmonize to perfection and at times their application may seem tenuous; yet, at least, with reasonable accuracy, they permit prediction as to the outcome of a lawsuit predicated upon the finding of particular facts. They promote certainty. The court has substantially followed the principle that "in the interpretation of statutes due regard must be had of the old law, the mischief and the remedy." (Woollcott v. Schubert, 217 N.Y.212.

A better understanding of these rules may be had by a consideration of the cases from which they evolved. To facilitate the discussion, the cases have been classified and will be treated as follows:

1. Cases falling without the statute.
2. Unauthorized use without color of permission.
3. Permissive use qualified by condition abrogating consent.
4. Permissive use modified by instructions not abrogating consent.
5. Presumptions.

1. Without the statute.- Joint owners or common owners are not liable for each other's negligence while operating the common automobile unless the same is being used in a joint enter-

prise. The object of the statute is to prevent an owner who had given permission, expressed or implied, for the use of the car from escaping liability by saying it was not used in his business. He was assumed to have the right of granting or withholding permission. If the car is being driven without his permission or contrary to his express orders no liability attached to him. The part owner of an automobile cannot choose the agent or employees of the other owner nor can he control possession of the car by the co-owner. Leppard v. O'Brien, 225 A.D.162, aff'd 252 N.Y.563. The same reasoning applies to a partnership car used without the scope of the business. A recovery against both partners is not justified. Bunnell v. Vrooman, 250 Mass.103.

The statute has no extraterritorial effect. Permission to use the car was granted in New York. The accident occurred in New Jersey. No recovery against the owner was permitted, for in the absence of evidence as to the New Jersey law, the common law rules were applied. Cherwien v. Geiter, 272 N.Y.165, affirming 244 A.D.814. The grounds of a private racing association are not a "public highway" within the definition of a "public highway", as used in the statute. Sylvester v. Brockway Motor Truck Corp., 232 A.D.162. This section does not impose any liability upon an owner of a trailer, which is not a motor vehicle within the meaning of the Vehicle and Traffic Law, Herrick v. Arborio, 144 Misc.15.

The statute is inapplicable to a municipal corporation. The use of a city car for a private purpose is unlawful even though the driver operates it with the knowledge of a superior officer. It is beyond the powers of any officer to permit the use of city cars for private purposes and the city cannot be held liable for the negligence of such drivers when acting beyond the scope of their lawful authority. Fox v. Syracuse, 231 A.D.273, aff'd without opinion, 258 N.Y.550.

2. Unauthorized use without color of permission.- This classification relates to the use of a car without any permission preceding the taking. Its application is obvious. Without there ever having been any permission or consent, the statute can not apply, not only because such use is not within the statutory definition, but because to hold a driver liable for all injuries occasioned by the negligence of a driver, except where the machin was stolen, would probably be held unconstitutional as violating the due process clause. Dougherty v. Thomas, 174 Mich.371.

Whether a driver has been given permission is usually a question of fact. If the uncontradicted evidence necessitates the conclusion that the driver of the motor vehicle was using it at the time of the accident for his own purposes exclusively, without the permission and against the commands of the owner, his employer, it will be decided as a matter of law that the operator was operating without permission. In Fluegel v. Coudert, 244 N.Y.393, the record showed that the driver had received express instructions to take the car to the garage when the family was through with it for the day. Instead of obeying these in-

structions, he was on his way home to his meal at the time of the accident which took him in a direction away from that of the garage.

The Fluegel case was one of the first to reach the Court of Appeals under the new section. In deciding it, the court formulated its first restrictive rule: that as to the master and servant cases, the old common law rule still applied to the extent of determining whether the servant had express or implied permission to use or operate the car or whether the car was being used contrary to instructions. It seems difficult to believe that the Legislature intended an exception in a situation such as the above where the chauffeur was detouring to get something to eat; but this strict application to the master and servant cases is probably justified on the ground that the duties of a private shauffeur usually are limited and prescribed. To impose liability upon the owner in such a case would seriously handicap the owner in directing how, when, or where his property was to be used by his employees. Atwater v. Lober, 133 Misc. 652.

In St. Andrassey v. Mooney, 262 N.Y.368, we find a much more justifiable set of facts for the application of the rule of non-liability where permission is lacking. The evidence conclusively showed that the accident occurred in the evening when the chauffeur was using the car to take his own friends out for a ride. He was clearly using the car for his own purposes. The court said that under these circumstances, an inference that the car was in the use of the owner, for his benefit and on his account, is excluded. Therefore, this together with the testimony of the owner and chauffeur of no permission, resulted in a dismissal of the complaint against the owner.

The presumption that the owner of a motor vehicle is responsible for the manner in which it is driven is overcome by evidence that the owner of the car was absent from the city for several weeks, and had placed the car in storage, and the car was used by one who not only had been forbidden to use it, but who did not have a license to operate an automobile. Ermann v. Kahn, 229 A.D.693.

It was to provide for situations like these that §1293-a of the Penal Law was enacted. It provides: "Any person who, under circumstances not consisting of larceny as defined by any other section of this article shall, without the consent of the owner take, use or operate.....an automobile or other motor vehicle, for his own profit, use or purpose, steals the same, is guilty of larceny and shall be punishable accordingly."

If there is a lack of permissive taking and using, which will free the owner from civil liability, the driver is very apt to become enmeshed in the criminal law. Section 1293-a of the Penal Law should tend to discourage collusion and perjury for the purpose of permitting an owner to escape statutory liability by asserting, and being substantiated by the driver, that the car had been taken and was being operated without the permission of the owner.

In Schillaci v. Fountaine, 164 Misc. 567, the record showed that the defendant owner was successful in avoiding responsibility on the ground that at the time of the accident the operator had no permission to use the car. In rendering the opinion, Justice Bergan directed "that a copy of the testimony of the owner and the operator be sent to the District Attorney of Albany County, where the accident occurred, for such action as he may deem proper." p.568.

3. Permissive use qualified by conditions abrogating consent.- If the permission, by which the owner consents to another's use of his motor vehicle, is so qualified by a condition which goes to the very essence of the consent so that continued permission is dependent thereon, breach of the condition terminates the consent and exempts the owner from any liability occasioned by the negligent operation of his automobile after such breach. The application of this limitation upon the statutory liability of the owner presents some factual distinctions which are easier illustrated than explained.

In an action by guests of the defendant's chauffeur against the owner for injuries resulting from negligence in the operation of the car, the trial court excluded evidence offered by the owner that she had instructed her chauffeur not to invite strangers to ride in the car. The court held, on appeal, that if such instruction were proved, the owner would not be liable under the statute. Psota v. Long Island R.R.Co., 246 N.Y.388. The court here stated that the Legislature by this act did not extend the liability of the master for the acts of his servant; that it placed the borrower of a car in that same relation with the lende as that of master and servant; but that it did not increase the liability of a master from the acts of a servant coming within the scope of his employment.

The Psota decision seems an unjust restriction on the broad language of the statute. The court reads into the language of the statute a limitation which is not expressed nor reasonably inferable, viz., that permission of the owner must be given not only to the operation of the car, but also to the presence in it of the injured person to render the owner liable. This strict construction may be justified, however, on the ground that the policy of the statute is to hold the owner liable for sending out on the highway a possible danger by entrusting his car to another. Those on the highway who are injured by the negligence of the driver have no connection with the creation of the danger. But one who voluntarily becomes a passenger for his sole benefit and contrary to the will of the owner, has as much casual connection with the injury as the owner.

The court in Chaika v. Vandenberg , 252 N.Y.101, evolved another type of restrictive condition. Here, according to the testimony of the owner, he had given his son permission to use the automobile only on Long Island. When the accident occurred, the son was operating in New York City. If the jury believe this evidence, they must find that at the time of the accident the son was using the car unlawfully, without permission of the owner, and even contrary to his orders. The court said: "The

language of the statute may not be construed to include such a case . . . merely because the owner had given the person operating the vehicle permission to use the vehicle for another purpose at another place."

In none of the cases searched by the writer has the question of use at an anauthorized place been decided as a matter of law; they are all submitted to the triers of the facts. In Nee v. Sloboda. 244 A.D.729, aff'd 270 N.Y.571, the intestate was riding in a car owned by the defendant and being driven by his son. Permission had been given to the son to go to a "dance at the high school." The son used it to drive to New York City and from there to a place in Orange County, remote from the school and the owner's home. The court held that there was a question of fact presented for the determination of the jury.

The third class of restrictive conditions involves the abandonment of the car by the permittee to a third person without the knowledge or consent of the owner. An owner-dealer loaned a car to a purchaser to use until the delivery could be made. The person to whom the car was loaned permitted another to take it for the latter's own purpose without the permittee being present. The court held that the car was loaned for a temporary purpose, but with no authority to re-loan or to permit another to use it. The permittee acted entirely on his own volition without the knowledge or consent of the owner. The third person was not engaged in the business of the owner and was not subject to his orders nor in any manner under his control. Here the evidence was deemed insufficient to hold the dealer under the statute. Owen v. Gruntz, 216 A.D.19.

In Woodland v. Cote, 252 A.D.254 there was evidence that the owner permitted a friend to use her car at will; that the friend and his employees used the car in his business and paid for the gas and oil; that the owner forbade the friend to loan the car without the owner's permission; and that the friend loaned the car to his servant for operation on the highway where the accident happened. It was held that the evidence was sufficient for the jury to find that the car was being operated with the owner's implied consent.

As dictum, the court held in Arcara v. Moresse, 258 N.Y.211, that "An owner in loaning his car may reasonably restrict the uses to which it may be put; consequently, its employment for a prescribed purpose cannot be a permitted use." Just what the court meant by "purpose" is a matter of conjecture as we have been unable to find cases squarely raising this point.

Whether New York Courts will follow Michigan in considering time limitation as a restrictive condition is also a matter for speculation. Under a Michigan statute, similar to that of New York, it has been held that the owner of a truck, who loaned it loaned it for a certain time, cannot be held liable for an injury which resulted from the negligent operation of the truck after the expiration of the time agreed upon. Union Trust Co. v. Am. Commercial Car Co., 219 Mich. 557, 189 N.W.23.

Section 1293-a of Penal Law (supra) is apparently inadequate to cover the above situations. The law provides that it shall be larceny for the taking, using, or operating of a motor vehicle without the consent of the owner. The court has been scrupulous in applying to this statute the general doctrine that statutes in derogation of the common law must be strictly construed. This probably accounts for our inability to find a conviction reported in any of the official reports. Although this section was enacted in 1909 and amended to its present form in 1928, there have been only two attempted convictions reported, - People v. Alaboda, 198 A.D.41, and People v. Ibey, 121 Misc. 286, - but both failed.

In the Ibey case it was the insufficiency of the information. The Alaboda case held that this section was not intended to change the common law rule as to conversion, and the Legislature did not purport to deal with a case where a person has come into possession of an automobile lawfully with the consent of the owner. Accordingly, a person who hires an automobile from the owner does not commit the crime of larceny under this section by failing to return it to the owner within the time agreed upon. In the absence of demand and refusal giving rise to an action in conversion, the owner's only remedy is an action for breach of contract.

With reference to a similar statute in Wisconsin, it was said: "The mere unauthorized or extended use of such a vehicle by one who has lawfully obtained the consent of the owner to its taking is not a violation of this statute; and . . . the substance of the offence aimed at by its provisions is the obtaining of the possession in the first instance without the consent of the owner." State v. Mularkey, 195 Wisc.549, 218 N.W.809, 810. "The gist of the offence is the taking and operating. . . without the consent of the owner." Huddy on Automobiles, (9th Ed.) Vol. 9-10, p. 194.

If, therefore, there is consent to the taking of the car with permission to use it, there is no violation of the statute even though the bailee goes beyond his contract of bailment and breaches a restrictive condition subsequent which will relieve the owner from liability. By conditioning permission by one of the restrictive limitations discussed in this section the owner may escape liability and the driver will not be amenable to the criminal law.

4. Permissive use modified by instruction not abrogating consent.- Frequently an owner lends his car without instructions, particularly to a friend or a member of his family. This constitutes a general permission which, so long as the permittee remains in possession of the car, renders the liability of the owner absolute for its negligent operation. The permittee becomes the alter ego of the owner and the owner's liability extends to guests of the permittee, as well as to travelers on the highway, regardless of who operates the car or when, where, or how it is operated. This liability ceases only upon the abandonment of the car to a third person.

Owners try to escape this broad liability by asserting that the driver did not operate the car pursuant to instructions relating to route, unauthorized drivers, or manner of operation. Such instructions are deemed insufficient to circumscribe the general permission to use and thus modify the owner's liability. The manner of operation may relate to speeding or careless pilotage of the car and though the instructions be disobeyed, nevertheless the use is with the permission of the owner. Deviations from a prescribed route, as contrasted with operation at a proscribed place, do not exempt the owner from liability if the operator is still engaged in the furtherance of the general enterprise for which the car is loaned. In Arcara v. Moresee, 258 N.Y.211, the court held that the permittee was, at the time of the accident, using the car though a third person was driving. The permittee did not abandon the car nor its use when he surrendered to another the guidance of the wheel; permission continued even though another drove the car against instructions. Unless instructions or directions reach the quality of restrictive conditions, the liability of the owner will remain unlimited.

In the restrictive condition cases the court, believing that the breach of the condition was so repugnant to the implication of continued permission, felt that it was compelled to rule that the car, subsequent to the breach, was being operated at the time and place of the accident without the consent of the owner. The court will not be astute, however, to find means by which the owner will escape the statutory liability and the court will go far to sustain a recover against the owner. Thus, it was held in Amann v. Thurston, 133 Misc.293, aff'd 224 A.D.874, that the owner of the car was liable to a guest of the permittee for the latter's negligence in operating the car. It made no difference that the owner did not know or assent to the presence of the guest in the car, nor that the trip, during which the accident occurred, was made solely at the request of the guest who was a passenger at his own solicitation.

It has also been held that the driver cannot escape liability by asserting that the operator, to whom permission had been given, was not of age and was illegally operating the vehicle. Incompetency is a responsibility of the owner, and "legally", as used in the statute, applies to the consent of the owner and not to the licensing statute. Dewitt v. Continental Casualty Co., 245 A.D.115, reversed on other grounds in 269 N.Y.474.

An illustration of "implied" consent may be found in Zuckerman v. Parton, 260 N.Y.446. The court held that an owner of an automobile who leaves his car at a garage and has reason to believe that in the performance of the work thereon, the car will be used upon a public highway by employees of the garage, is liable for its negligent operation. Under such circumstances the use of the car is with the implied consent of the owner.

5. Presumptions.- The restrictions placed upon the construction of the statute may appear to have circumscribed its efficacy to a great extent. This is not true entirely. While some of the master and servant applications of the statute have been restrictive, there are strong presumptions favoring the

plaintiff which are difficult to overcome. The plaintiff may rest after proving the prima facie case of negligence together with the fact that the car involved is registered in the name of the defendant. The defendant is conclusively presumed to own the car. It has been held that one, who has deliberately caused an automobile to be registered in his name as owner, will not be permitted, after it has been involved in an accident and caused injury, to deny the truth of the statement. Shuba v. Greendowner, 271 N.Y.189. There is also another presumption that the person using the car was doing so with the implied permission or consent of the owner. Piwowarski v. Cornwell, 273 N.Y.226.

This latter presumption of permissive use is one of fact, and until overthrown by substantial proof, stands as a fact established. Rose v. Balfe, 223 N.Y.481. The duty of going forward with evidence and overcoming the plaintiff's proof is shifted to the defendant. Even where uncontradicted evidence is adduced to defeat the presumption, with few exceptions, the weight and credibility of such evidence, which is usually elicited from interested witnesses, presents questions of fact for the jury. Very few cases have been decided as a matter of law. Where the plaintiff has succeeded in establishing his prima facie case, and it appeared that the car had not actually been stolen, the juries, in the reported cases, have been lenient in permitting recoveries by plaintiffs. Consequently, the remedial purpose of the statute - greater protection to the public from the operation of motor vehicles when negligently driven - is substantially achieved by the pragmatic triers of the facts.

CLARENCE HENRY GIRARD

ERROR UNDER DOUBLE JEOPARDY RULE

It is evidenced by an overwhelming weight of authority in the United States and England that the constitutional prohibition against placing anyone in double jeopardy should be interpreted as meaning that there can be no appeal by the state and therefore, of course, no retrial. Nevertheless, it shall be the purpose of this article to fly in the face of entrenched error and, with the support of Mr. Justice Holmes and others, to demonstrate the fallacy of that interpretation.

Analyzing the recent case of Palko v. State of Connecticut, 58 S.Ct. 149, as a starting point and advancing therefrom, the attempt will be made to show that the original meaning was different, that the present erroneous view resulted from an early conception of justice in which trial and punishment had become elided, that it was properly applied to early procedure but has been permitted to violate modern procedure, that the rule is contradicted by some of the very cases which apply it, that there is a sound basis for reversing that interpretation, and that such reversal is needed for the sake of consistency and would not violate any legal nor moral principles.

Palko v. Connecticut, supra, arose under a Connecticut statute permitting an appeal by the State, General Statutes of Connecticut §6494, "Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the Supreme Court of Errors, in the same manner and to the same effect as if made by the accused."

Palko, indicted for murder, was convicted in the second degree. The State took the appeal and on a new trial obtained a first degree conviction. This reached the United States Supreme Court on a Federal question, where the statute and the conviction were upheld.

This is not so startling as it seems. First it must be noted that the Connecticut Constitution contains no jeopardy clause, and second, that such clause in the Federal Constitution is not applicable to the states. Obviously some other theory of invalidity was necessary to challenge the statute. The question was raised under §1 of the 14th Amendment which reads in part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But the court properly held that the freedom from double jeopardy was not included in such immunities.

From this it may be seen that the court did not determine the question of such appeal in the Federal courts nor under state constitutions containing such provision. Nevertheless it is a step in the right direction and tends to show a more open attitude on the part of the Court as may be seen from this statement from

the opinion, "Right-minded men could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind."

The phraseology in which this principle originated connotes its first meaning. As Lord Coke records it, "Nemo debet bis puniri pro uno delicto." Translated, that becomes, "No one can be twice punished for the same crime." Other terminology used conveyed the same meaning. Even as recently as 1852 it was similarly stated in State v. Cheevers, 7 La.Ann.40, where it was asserted that jeopardy of life or limb means punishment so the principle is that no man shall be punished twice for the same criminal act.

It should be clear then that the principle had its inception in a desire to prevent exposure to a second punishment after one penalty had been imposed. It was not directed at a trial without punishment, for it can scarecely be said that a trial itself is punishment unless it is further stated that all those who participate in a trial are equally punished. Though perhaps it was true in some early forms of trial, such as trial by combat, that the punishment had been inflicted in the course of the trial. But in any event it must be agreed that the purpose was not to avoid the danger of being tried, but the danger of being punished.

In the early days of this development fines and imprisonment were rare, the usual punishment consisted of death, mutilation, whipping, or some other form of physical violence inflicted during or immediately after the judgment. This was clearly recognized in Ex Parte Lange, 85 U.S.872, "....at the time this maxim came into existence, almost every offense was punished with death or other punishment touching the person." The punishment was corporal.

Although there were rare appeals they were not at the request of the parties but rather were directed by the whim of the King or some of his representatives. There was no right to appeal. As stated in People v. Palmer, 109 N.Y.413, "The right to review by writ of error or by appeal did not belong to the prisoner at common law." So the punishment was inevitable.

And "as a matter of fact, the advantages which an accused man received under the English system were illusory. He never saw the indictment until it was read to him. He could call no witnesses on his behalf. He was not permitted to have counsel. It is small wonder that in England, just as on the Continent, accusation was practical conviction. Acquittals were extremely rare." (Radin on Anglo-American Legal History PP. 228-229. Conviction was certain.

Thus it is not surprising that the meaning of the word "punishment" was extended to include the trial as well. With conviction the foregone result of trial and promptly followed by unavoidable and violent corporal punishment, it is obvious why trial

and punishment became synonymous to the common man, the meanings of the terms were indistinguishable, the trial was mere formality leading to the punishment. There is no doubt but that a trial did indeed place the accused in jeopardy. As a procedural question the end of the trial was final. It should not be attacked collaterally and it could not be attacked directly because there was no procedural mechanism for a direct attack.

Thus it may be seen that the jeopardy was complete, the determination of the court was conclusive and stood unchanged just as the present-day judgment stands if not contested by appeal. Then a new trial could only occur while the record still held a valid and binding judgment. And under such circumstances it was quite correct to say that a new trial constituted double jeopardy, while the previously ordered punishment was still applicable, or perhaps after it had been inflicted.

Since then the judicial system has been altered to include provisions for appeal and retrial of cases. But this is merely a procedural change, and is not properly affected by the rule as to double jeopardy, since changes of procedure are wholly within the powers of the sovereign. Under the common law, due process consisted of one final adjudication; today due process consists of trial and appeal and any further necessary proceedings. In neither case can it properly be said that the first jeopardy has ended until due process has run its course.

Bishop on Criminal Law, 9th Edition §980 quotes State v. Lee 65 Conn.265, wherein it was said, "The maxim is based on the truth that a judicial proceeding lawfully carried on to its conclusion by a final judgment puts the seal of finality on the controversies determined by that judgment, and is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the state deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law."

The same effect was recognized in the case of Commonwealth v. Arnold, 83 Ky.1, when the court upheld a statute providing that "the granting of a new trial places the parties in the same position as if no trial had been had." If such statute may properly be held valid, then the same would have been true without the statute. For if, in absence of statute, the opposite were true, any statute attempting to make such provision must necessarily have violated the double jeopardy clause.

The Fifth Amendment to the Federal Constitution reads, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." As placed in Article I §6 of the New York State Constitution it reads, "No person shall be subject to be twice put in jeopardy for the same offense." Most states have similar Constitutional provisions.

These provisions are positive and mandatory in their language. If that mandate means, as it is so generally interpreted, that there can be no appeal by the State, then of necessity Con-

gress and the Legislature are bound thereby and they are constitutionally prohibited from legislating to the contrary. And yet, in many of those cases in which the rule has been applied, the court, by necessary implication, has contradicted that interpretation by imputing to the legislative body the power to pass such legislation.

In the case of United States v. Sanges, 144 U.S.310, it was stated by Mr. Justice Gray that, "the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes." The Iowa Supreme Court held that "no person shall after acquittal be tried for the same offense, there being no law to authorize a writ of error on the part of the state in a criminal case." State v. Johnson, 2 Iowa 549.

These cases and many others making similar statements show a belief in the propriety of statutes expressly giving to the state the right of appeal. But apparently they fail to recognize the violent inconsistency of their attitude. If the constitutional provision is given their interpretation as prohibiting appeal, then any such statute would be invalidated thereby. If the Constitution does not have that meaning, then the right of appeal by the state exists without express legislation because it is within the general powers of the courts.

In the famous Kepner case, Kepner v. United States, 195 U.S. 100, Mr. Justice Day attempted to show, and it was an important part of his argument, that Mr. Justice Gray did not mean to give that implication in the Sanges case. But unfortunately Mr. Justice Day fell into grave error which has apparently passed unnoticed.

Mr. Justice Day wrote thus, "that the learned Justice (Gray) could not have intended to intimate that a second prosecution could be allowed by statute after an acquittal of the offense is shown by the subsequent decision of this court in United States v. Ball, 163 U.S.662, in which Mr. Justice Gray also delivered the opinion of the court." Part of the opinion quoted by Day from the Ball case follows: "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution."

But it must be pointed out that Mr. Justice Day, through failure to distinguish the cases, drew the fallacious conclusion that the latter statement by Gray was inconsistent with the earlier one. It is necessary to note that the Sanges case was decided on a motion to dismiss a writ of error sued out by the prosecution after acquittal of defendant. But in the Ball case the acquittal was not directly challenged. There three men were indicted, two were convicted and one acquitted. The appeal was taken by the two convicted and it resulted in the issuance of a new indictment against all three. The one acquitted pleaded his previous acquittal and it was held a bar. But it must be noted

that no appeal was taken by the prosecution nor by the acquitted, so the acquittal still stood as a final and unchallenged determination of the court. And as Justice Gray said and Justice Day unwittingly quoted: "But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided cannot be collaterally impeached.

So it may be clearly perceived that Mr. Justice Day discovered an inconsistency where none in fact existed, and he proceeded from that fallacious finding to his final determination.

It being thus apparent that the majority decision of the court was based on error, it is proper to notice the fact that it was a five-to-four division of the court and that Mr. Justice Holmes delivered an able dissenting opinion from which the following excerpts are quoted:

"It seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of its cause. Everybody agrees that the principle in its origin was a rule forbidding a new trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case."

"If a statute should give the right to take exception to the government, I believe it would be impossible to maintain that the prisoner would be protected by the constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.

"A statute may authorize an appeal by the government from a decision by a magistrate to a higher court, as well as an appeal by the prisoner. The latter is everyday practice, yet there is no doubt that the prisoner is in jeopardy at the trial before the magistrate, and that a conviction or acquittal not appealed from would be a bar to a second prosecution. That is what was decided, and it is all that was decided or intimated, relevant to this case, in Wemyss v. Hopkins' L.R., 10 Q.B.378. For the reasons which I have stated already a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below."

Such an analytical investigation into the erroneous ruling opinion of the Kepner case in connection with the strong dissent of Holmes provides a splendid stepping stone from which the courts may work their way to the logical result of recognizing the right of the state to appeal. It may further be supported by many other decisions.

Kent's Commentaries, Vol.II, P.12, note, cites United States v. Gilbert, 2 Sumner 19, as expressing the generally accepted opinion and then continues, "But in opposition to this opinion, it has been adjudged by Mr. Justice McLean, in an equally elaborate opinion, in the case of United States v. Keen, 1 McL.429, that the courts of the United States have a constitutional power

to grant new trials in capital as well as in other criminal cases."

The case of Commonwealth v. Arnold, 83 Ky. 1, was concerned with the question of trial for the higher degree of a crime after conviction on the lower degree followed by reversal. In that case it was said, "The implied acquittal is not a bar to retrial. The Legislature has the right to prescribe the terms on which a person convicted of murder may have a new trial."

In the case of United States v. Simms, 1 Cr.252, the defendant had been acquitted of a gambling charge, in the Circuit Court. An appeal was taken to the United States Supreme Court, which affirmed the decision. That case was referred to by Marshall in United States v. More, 3 Cr.159, where he said that the question was not raised in the Simms case and the court did not consider itself bound. But he did not explain the fact that the court had taken jurisdiction of a case which obviously on its face was not subject to its jurisdiction under the theory that no appeal should be permitted to the state. And he did further say, "This court will only review those judgments of the Circuit Court, a power to re-examine which, is expressly given by law."

In the More case, a very able argument was made by United States Attorney Mason for the appeal, in which he cited Clarke v. Bagadone where the court said, "It is a general principle that the proceedings of an inferior tribunal are to be corrected by the superior unless the latter is expressly restrained from exercising such control." And Mason's argument continued to the effect that the Supreme Court has appellate jurisdiction with such exceptions as Congress shall make, and Congress had made no exceptions in this case.

The case of State v. Caldwell, 9 Wash.336, 37 Pac.669, upheld a statute providing that dismissal of an indictment for want of prosecution shall not bar a second prosecution for the same offense.

Stewart v. State, 13 Ark. 720, held that a conviction in a criminal case reversed an appeal for error in the proceedings, is not a bar to a further prosecution on the same indictment, because, by reason of the first conviction being erroneous, there was no jeopardy.

These cases lend themselves to the logical inference that the Government is not prohibited from legislating to provide such appeal. And if that is true, then no express legislation is necessary because the general power already exists and the mandatory provision of the Constitution is not applicable to this case.

Therefore to permit such appeal would not be violative of any legal right. Nor would it be objectionable from any moral standpoint. As Mr. Justice Holmes said in the Kepner case, "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny." And if that were true in 1903 it is even more so now. It can scarcely be argued that a criminal would be unduly imposed

upon by being compelled to submit to the powers of the Court until he has had a fair trial free from error. In fact, the Court expressed this thought well in Palko v. Connecticut, supra, thus, "The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free fromthe corrosion of substantial legal error. (State v. Felch, 92 Vt. 477, 102 Atl. 23; State v. Lee, supra). This is not cruelty at all, nor even vexation in any immoderate degree." It cannot be claimed that a criminal should have the absolute right to go free and unpunished for his crime merely because some other person has arrived at an erroneous conclusion. The criminal is nonetheless guilty because of such error. Nor can it be contended that the innocent will be unduly vexed or put in any greater danger of suffering an undeserved punishment, since once he has had an error-free trial it must be presumed that an innocent man will be acquitted.

In this day of scientific and advanced crime it is pretty generally known that hundreds of crimes pass unpunished for every one punished. It is no secret that this is principally the fault of the law and its application. To permit appeals by the state would overcome some of the handicaps of the law enforcement officer, without creating any greater danger to the innocent.

Such change would also have the effect of producing one uniform rule in all cases and applicable throughout the land, where now there is great diversity. Let the next case of this type to reach the Supreme Court be the vehicle by which the court may say, "The right of the State to appeal is clear. It is a purely procedural question and in no way infringes the Fifth Amendment. All previous decisions to the contrary, this court will not permit entrenched error to prevent it from arriving at a correct determination."

JAMES WESTCOTT MOORE

NINETY-SIX YEARS OF JUDICIAL ERROR UNDER SWIFT v. TYSON

The King is dead; long live the King! A loose freight car door was swinging in the wind from a passing freight train on one dark night last year in Pennsylvania. It struck one Tompkins as he was walking along a beaten footpath near the tracks. As it did it struck the death knell to Swift v. Tyson, 16 Pet. 1.

The Swift case involved the construction of §34 of the Judiciary Act of 1789, which provided that "The laws of the several States . . . shall be regarded as rules of decision in trials of common law, in the courts of the United States, in cases where they apply." The case was an action on a bill of exchange, brought by the holder against the acceptor; the defense was a fraud of the drawer of the bill. The question for decision was whether the holder, who had taken the bill as payment for an antecedent debt, was free from this defense of fraud as a bona fide purchaser for value. To determine this question the court had to decide whether they would apply the law as the New York courts interpreted it since the cause of action arose there, or apply the law as they -the Supreme Court- interpreted it. Were they bound to apply the New York rule under the above Section of the Judiciary Act? The Court decided that the word laws meant statutory law and well settled local usages in matters of purely local concern such as title to real property, but that in matters of commercial transactions and other so-called transitory actions the Federal Courts were free to determine what they thought the common law on the subject was. The Court undoubtedly was influenced by a desire to promote uniformity of decision through the persuasive example of Federal Court's decisions. However, the State courts were not so amenable to the will of the Federal courts and they continued to interpret the common law as they saw it. Instead of promoting uniformity this decision was a fountain of uncertainty.

Perhaps no other case in this country has led to more injustice. Praise to the men with the courage and judicial learning to destroy this monster.

The most mischievous effect of the decision was that it led to grave discrimination by non-citizens of a state against citizens. It gave non-citizens the choice of bringing their action in the tribunal which interpreted the common law more favorably to their side of the case. The Federal Constitution gave non-citizens the privilege of bringing the suit in the Federal courts if they wished to, but if they chose to sue in the defendant's home state, the defendant could not complain. Citizens when dealing with non-citizens had to conform to two sets of laws.

Two cases will illustrate the ridiculous results of this case. They are, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, and Gelpcke v. Dubuque, 1 Wall. 175.

In the Black case, the Brown & Yellow Company, a Kentucky corporation, and the Louisville & Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passengers and baggage at the latter's depot at Bowling Green, Ky.; and that the Black & White, a competing Kentucky corporation, should be enjoined from interfering with the privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown & White be re-incorporated under the law of Tennessee and that the contract with the railroad be made there. They then brought a suit to enjoin competition by the Black & White in the Federal court under the diversity of citizenship clause, well knowing that the Federal common law would sustain this contract. This legal subterfuge worked, but not without a dissent. The late Mr. Justice Holmes, true lover of justice that he was, refused to extend the Swift v. Tyson doctrine and questioned its expediency, pointing out the fallacy underlying the doctrine.

In the Gelpcke case, the question of the liability of certain Iowa cities and counties on bonds issued to help railroad extension was involved. The Iowa Supreme Court held that the municipalities were not liable. But when non-resident bondholders sued in the Federal court a contrary judgment was rendered. The Iowa courts then enjoined the taxing authorities of the municipalities from assessing a tax to pay the amount of the bonds. The non-residents then went to the Federal courts and obtained a writ of mandamus requiring the taxing authorities to assess the taxes and pay the bonds. More than that, the United States Supreme Court ordered mandamus to issue to compel the levy of a tax although the statutory limit on taxes had been reached for the year. As a result, over a hundred of the best citizens of Iowa were committed to jail for obeying, -as they thought- what their oath of office required them to do. How could the operation of the law in a civilized country reach such an abominable state?

To extend this doctrine to its logical conclusion, two persons could be riding side by side in a train, and be injured in the same train wreck; one could recover while the other with identical witnesses and legal counsel could lose. Such a doctrine must have the grave for its goal. It has not been disappointed.

One Tompkins was injured while walking along a beaten footpath near the tracks of the Erie Railroad in Pennsylvania, by a loose freight car door. He brought a suit in the Federal court, the defendant being incorporated in New York State. Tompkins claimed that he was a licensee and that the defendant owed him the duty of reasonable care. The defendant claimed that he was a mere trespasser and that they were not liable unless they were guilty of willful or wanton negligence. The defendant claimed that the law of Pennsylvania applied, to determine whether the plaintiff was a licensee or a trespasser. In arguing the appeal they expressly accepted the rule as expressed in Swift v. Tyson but maintained that this case was an exception to the rule. We thus have the Supreme Court overruling a case without argument by counsel.

To think that the court would overrule Swift v. Tyson must have been beyond the wildest dreams of the litigants. The plaintiff had recovered a $30,000 verdict in the trial court and the decision in this case must have hit him like a bombshell. As was stated by a current legal authority, "Presumably Harry Tompkins was unfamiliar with the deep and stormy currents of political and legal controversy in which he had unhappily been caught. He probably does not appreciate the honor of giving his name to a leading case, at a cost of $30,000."

Erie R.Co. v. Tompkins, 304 U.S. 64, held that there is no Federal general common law and that in Federal courts, except in matters governed by the Federal Constitution or by acts of Congress, the law applied in any case is the law of the state. This case holds that the Supreme Court was in error when it construed the word laws as it did in the Swift case.

With the results of this case we are in complete accord. With the reasons which the court gave for its decisions, we cannot so readily agree.

The Court needed but to say that they had heretofore been mistaken in their construction of the Judiciary Act and that they were righting their wrong. As Mr. Justice Reed said in his concurring opinion, "In this Court, stare decisis, in statutory construction, is a useful rule, not an inexorable command." However, the Court predicated its decision on Constitutional grounds. They said that the previous interpretation was not possible as it was unconstitutional. In saying this they violated some judicial policies. They overlooked the rule that constitutional questions will not be decided unless necessary to the disposition of the case; also the rule that before constitutional questions are decided, the court should seek assistance of counsel and decide only after ample deliberation. In the instant case the matter was not even mentioned by counsel, and indeed they admitted the constitutionality of the Court's interpretation of the Judiciary Act.

Also the course pursued by the Court was repugnant to the Act of Congress of August 24, 1937, 50 Stat. 751, 28 U.S.C.A. 17, which declares that: "Whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States . . . . the Court shall certify such fact to the Attorney-General. In any such case the Court shall permit the Attorney-General to become a party for the presentation of evidence and argument upon the question of the constitutionality of such Act." The court failed to call in the Attorney-General in this case. It can truthfully be said that the Court "took the bull by the horns."

There are still a few questions which must be decided under this new doctrine. Is the question of law involved, one of adjective law, or one of substantive law? If it is one of adjective law the Federal rule will apply, as a court regulates

its own procedure. Also, there may be a dispute as to which State law applies. In deciding this question of Conflict of Laws - the rules on the Conflict of Laws of which State will they apply? As to this last matter, it is self-evident that the Federal courts must apply their own interpretation of what State's rules in respect to the Conflict of Laws really applies.

The Tompkins case stands out for one other reason. In this day, although the Supreme Court is anxious to extend the power of the Federal Government to fields heretofore exercised by the States alone, it is not reluctant to leave to the States those powers which the State can best control in the interest of general welfare.

RUSSELL FRANK CREGO

STATUTE OF LIMITATIONS - EFFECT OF SERVICE UNDER MOTOR VEHICLE & TRAFFIC LAW §52

The Court of Appeals has affirmed the recent Appellate Division decision that the fact that a motorist from another state has, under §52 of the Motor Vehicle & Traffic Law, designated the Secretary of State his agent for service of process in any action involving injuries to persons or property due to the operation of his car, does not create an exception to the tolling provision of the Statute of Limitations. An Illinois court reached the opposite conclusion on the same set of facts in a decision made the same month as the Appellate Division decision, under statutes substantially the same as the New York laws.

The reason for this variance in application of the statutes is the difference of ideas of the purpose of the Statute of Limitations. A large number of states take the position that there should be no interruption in the running of the Statute of Limitations so long as it is possible to serve the defendant in a personal action. Others give the Statute a literal reading and decide that any absence will interrupt its running unless squarely within some exception. The New York courts seem to lean toward the latter view.

The only New York case on the question involving service under the Motor Vehicle & Traffic Law is Maguire v. Yellow Taxicab Corp., 258 A.D.249, affirmed without opinion, 278 N.Y.106. In this case, Oscar Speck, a resident of Connecticut, came by automobile to New York City. While operating his car there he collided with a taxicab, causing the plaintiff's injuries, to recover damages for which this action was brought. More than three years after the date of the accident the plaintiff served a summons upon Speck by delivery thereof to the Secretary of State and by a compliance with the other provisions of §52 of the Motor Vehicle & Traffic Law. The defendant answered setting up the three-year Statute of Limitations. The plaintiff, by reply, averred that after the cause of action set forth in the complaint accrued against the defendant he departed from the State and remained continuously absent for one year or more and that excepting the time he was absent from the State, three years did not elapse between the accrual of the cause of action and its commencement.

The court held that service on Speck was made in time as he did not bring himself under the exception set forth in §19 of the Civil Practice Act which declares that if, after the accrual of a cause of action, a defendant departs from the State and remains continuously absent therefrom one year or more, the time of his absence is not a part of the time limited for the commencement of the action; but this section does not apply while a designation made in pursuance of law of a resident of the state upon whom a summons may be served for another person or corporation remains in force.

The involuntary appointment by a non-resident of the Secretary of State as a person upon whom the summons may be served, provided by §52 of the Motor Vehicle & Traffic Law, is not a designation made in pursuance of laws of a resident of the State, for the designation referred to in §19 of the C.P.A. is a voluntary one. An example of a voluntary designation comprehended by C.P.A.§19 would be one in writing made by an adult resident of the State, of another resident upon whom any process might be served during the former's absence from the State as provided for by §227 of the C.P.A., §401 of the C.C.P., which was supplanted by §19 of the C.P.A. specifically exempted from its operation a designation prescribed by §430 C.C.P., now §227 C.P.A.

Other grounds for the decision were that the clause in §19 "while the designation remains in force" implies that the section applies only to revocable designations while the appointment under the Motor Vehicle & Traffic Law is irrevocable. Also, the latter section was adopted nine years after §19 of the C.P.A., and with the many intermediate steps and conditions, such as mailing by registered mail of the summons and filing of a return receipt, before service is complete, is quite different from service provided in a general designation applying to all types of actions and voluntarily made by a resident of the State of another resident of the State.

Commenting generally the Appellate Division said that the trend of adjudications in this State has long been in the direction of broadening the scope and operation of general rules regulating limitations embodied in the statute. Under National Surety Co. v. Ruffin, 242 N.Y.533, a statute of limitations is to be liberally construed in favor of the claimant. A non-resident defendant who, having caused injury to others in an accident, thereafter absents himself from the State, thus preventing personal service of process upon him within the State, is not entitled to the benefit of a statutory exception which permits the running of the Statute of Limitations during the time of his absence unless he has brought himself squarely within the language of the exception.

In the Illinois case, the plaintiff was injured when the defendant's truck collided with a street car in which the plaintiff was riding. The defendant was served by filing a copy of the summons with the Secretary of State following the procedure prescribed by the Motor Vehicle Act of Illinois. The defense was the two-year statute of limitations and the plaintiff relied on a section of the Limitations Act providing that if when a cause of action accrues against a person he is out of the State, the action may be commenced within the time limited after his return. The court held that the Legislature obviously intended to create an exception to the section of the Limitations Act which provides for the tolling of the statute while a defendant is out of the State. The primary purpose of the Motor Vehicle Act is to give speedy adjudication of the respective rights of the parties and to give the plaintiff compensation for damages if so entitled. The court also took the position of the dissenting judges in the Maguire case that an injustice would result if

the plaintiff could defer service indefinitely when the opportunity for service is continuously open. Nelson v. Richardson, 15 N.E. (2d) 17.

The plaintiff in Nelson v. Richardson cited Bode v. Flynn, 213 Wis. 509, 252 N.W.284, in support of its view of the case, but the court pointed out that it is followed by a minority of states.

Bode v. Flynn was another automobile collision case in which the defendant was a non-resident of the State. It was held that the Statute of Limitations did not run in spite of the designation of the Secretary of State as agent for the service of process because the statute excepting persons from the operation of the Statute of Limitations while out of the State had been specifically limited only in case of corporations owning manufacturing plants. It also based its decision on the doctrine in Chemung Canal Bank v. Lowery, 93 U.S. 72, 77, 23 L.Ed.806, that a personal obligation is due at the domicile of the obligee. It is the duty of the debtor to seek the creditor and pay him his debt at the domicile of the latter. Not doing this he is guilty of laches against the law of the creditor's domicile as well as his own. He evades this law by absenting himself from the jurisdiction. As long as he does this the Statute of Limitations ought not to run to the creditor's prejudice.

An annotation to this case in 94 A.L.R. 486 considers the application of non-residence and the possibility of constructive service in connection with the Statute of Limitations. A few courts, taking a literal view of the statute have held that it stops running during the time a defendant is absent from the state notwithstanding the fact that under statutory provisions process could be served, and an action commenced in spite of the defendant's absence from the state. This was so held in cases where the summons could have been effected by substituted service by leaving a copy of the summons at the defendant's place of residence. Ruth v. Holman, 105 Kans. 175, 182 Pac.416; Kieth-O'Brien Co. v. Snyder, 51 Utah, 227, 169 Pac.954; Anthes v. Anthes, 21 Idaho 305, 121 Pac.553.

In Parker v. Kelly, 61 Wis. 522, 21 N.W.539, it was held that the fact that a resident of the State who at the time of the accrual of the cause of action against him was out of the State, could have been served with process, would not prevent the suspension of the running of the Statute of Limitations. Whether the full or partial remedies of the law are or are not suspended by a resident of this State being temporarily out of the State cannot be considered ingiving effect to this plain and unambiguous language, for it is evident that it was not considered by the Legislature.

In New York State the only decision on the effect of possible substituted service upon the tolling provision of the Statute seems to be Malakoff v. Frye, 158 Misc.171, 284 Supp.22, which was decided under the laws of the State of Washington. A foreign corporation Licensed to do business within the State under S.C.L. §111 does not depart from the State when its desig-

nated process agent leaves the jurisdiction so as to suspend the running of the Statute, since §19 of the C.P.A. applies so long as the designation of the agent by the Corporation remains in force. Peters v. Wells-Fargo Co., 211 A.D.772, 207 Supp.657.

Section 19 of the C.P.A. applies in the case of mortgagees absent from the State pending a foreclosure action against themselves. Simonson v. Nafis, 36 A.D.473, 55 Supp.449.

It is apparent from Maguire v. Yellow Taxicab Co. and the authorities it discusses - Gaines v. City of New York, 215 N.Y.533, and National Surety Co. v. Ruffin, 242 N.Y.413, - that New York is among the states tending toward a literal reading of the tolling provisions in the Statute of Limitations.

Combs v. Darling, 116 Conn. 643, 166 Atl. 70, is a leading case for the theory that where service is possible the Statute will not toll. It was an automobile accident case where the defendant was a non-resident who had been served after the period of limitation, if the time of his absence were counted. The court held that the purpose of the statutory provision excluding from the period of limitation the time during which the defendant was without the State was to preserve the plaintiff's right of action during such absence when it was impossible to serve the defendant in an action in personam. Therefore, where by statute process against a non-resident in an action involving an automobile accident could be served upon the Commissioner of Motor Vehicles in the State, the reason underlying the suspension of the running of the Statute during the defendant's absence did not apply, and the running of the statute would not be suspended during such period.

The only instance in which New York courts have taken anything resembling this point of view is in distinguishing between the effect of casual visits to the State during the running of the Statute by a non-resident and a resident. In the case of a resident, casual visits revive the running of the Statute and in the case of a non-resident they do not affect it. The reason given is, distinction between the status of an absent resident and a non-resident and the ability of a creditor to pursue them. An absent resident is subject to the laws of the State and can be reached by its process, even though not personally served; but the State has no power to render a personal judgment against a non-resident unless he is served with process within the State. Carmody's New York Practice, Vol. 2, p.754 §475, and Connecticut Safe Deposit & Trust Co. v. Wead, 172 N.Y.497.

JOHN ROSS

MUNICIPAL IMPROVEMENT OF MANUFACTURING PROPERTY

It is common knowledge that in the past eight years many cities have been forced to take over real estate for unpaid taxes. In many cases this property is at least potentially valuable for manufacturing purposes. The question which has faced these cities is the method of advantageously disposing of this property; to restore it to the tax rolls and to utilize it for production and employment, thus benefiting the city and its inhabitants. Sometimes the city is able to sell such properties in the same condition as when acquired. But much of such property is badly in need of repair. This note is concerned with the question of whether the city may make repairs and alterations to property owned by it, so as to make the property salable.

That the city has no power to engage in business itself, except a business which is essentially public and for the public good, is well established (Sun Publishing Co. v. Mayor, 8 A.D. 230, aff'd 152 N.Y.257). Article VIII § 10 of the New York State Constitution provides that, no . . . city . . . shall loan its money or credit to or in aid of any . . . corporation. Under this section it has been decided that a municipal corporation cannot issue bonds to buy stock in a lumber mill (Weismer v. Village of Douglas, 4 Hun 201, aff'd 64 N.Y.91), and there have been many similar decisions.

In Walrath v. City of Salamanca, 255 A.D.158, defendant owned a large manufacturing plant which had been taken over for taxes and had fallen into disrepair. A responsible concern offered to lease the building, with an option to purchase, if the City would put the plant in a usable condition. This the City prepared to do, after a taxpayers' election had authorized the issue of bonds to finance the repairs. Plaintiff, a taxpayer, claiming that this violated the constitutional prohibition, sued to enjoin the sale of the bonds. The position of the plaintiff was, that the City was planning to aid a particular corporation by advancing money to repair and adapt a building to the particular needs of the corporation. The money was to be repaid within a period of ten years by rent, but plaintiff claimed that this constituted a loan of money in aid of the corporation. The position of the City was that as landlord, it had the right to repair its own buildings under §§22, 51, and 8a ¶9 of the General Municipal Law; that it could do as it liked with its own buildings, making such repairs and alterations as it saw fit, and then disposing of the plant as seemed wisest.

The Fourth Department of the Appellate Division, two judges dissenting, held that the issue of the bonds was constitutional, and cited as its main authority the case of Simson v. Parker, 190 N.Y.19. In that case, the Village of Tonawanda contracted to sell surplus water to a corporation outside the village limits, which would necessitate some slight expenditure for laying and maintaining a water main. In holding the sale valid, the court said: "The sale of city property for which the

city has no use is in no sense a gift to or in aid of the person to whom the sale is made. Nor is an obligation necessarily incurred in making the sale in any sense a creation of an indebtedness for other than a city purpose." Likewise, the City of Salamanca could put its property in fit condition for sale. Whether or not the extent of the expenditure was proper, was a question which the court refused to decide, saying that such questions must be left to the discretion of administrative officers of the City and the courts could not control their judgment. The money was to be used for the repair of city property. This was a city purpose, and the responsibility for the exercise of the power was not the court's. It was on this point that the dissent is based. The two dissenting judges felt that under the guise of repairs, betterments to the building were to be made, and such an obligation would not be "necessarily incurred" within the holding in the Simson case.

There is little authority to be found for a decision either way. The Simson case seems to be the only case even remotely in point. At first thought, it may seem that the issue of town and county bonds for the purchase of railroad stock is analogous, but it is not, since railroads are affected with a public interest, and the bonds were issued under an enabling statute, which statutes in the various states, incidentally, were generally found somewhat difficult to sustain.

It is only recently that conditions leading to the question presented in the Walrath case have been prevalent. Certainly the decision is economically sound, regardless of the strict legal precedents. When there are few, if any, precedents, the power of the city to improve the condition of its inhabitants by aiding their employment should not be hampered by strict and arbitrary interpretation of the law. A decision the other way would force a city obtaining property by tax deed to make no repairs other than for the actual preservation of the property in the condition in which it was received, which - in the case of property sold for taxes - would generally be poor. Such a determination would make it more difficult for cities to restore their manufacturing plants to community assets rather than liabilities. On such a basis, if no other, the determination of the court can be sustained.

RICHARD BELL CONGDON

N O T E S

ADMISSIBILITY OF LIE-DETECTOR TESTS.- The recent case of People v. Forte, 167 Misc. 868, was a prosecution for murder in the first degree. The defendant had been tried and convicted. Subsequently the judgment was reversed on a matter of law and a new trial was ordered. A motion is now made that the defendant be subjected to examination under a pathometer or so-called "lie-detector."

The question whether such examination is admissible against a defendant has never been decided by the Court of Appeals. This case was tried before Judge Fitzgerald of the County Court, Kings County. There is, however, another case decided by Judge Colden of the County Court, Queens County which held that such examination is admissible. In fact, the case of People v. Kenney, 167 Misc. 51, was decided by Judge Colden two months prior to the "Forte" case, and is the only other reported criminal case in which the question of the admission of a "lie-detector" in evidence arose.

Although in People v. Forte the court rendered a decision contrary to that in the Kenney case, a review of both cases will show that the decisions were based on the same principle of law but that the judges differed mainly on whether the machine is perfected at the present time.

It seems that both judges agree that the use of the "lie-detector" is not to establish any independent fact in issue; its primary,- indeed its sole - purpose is to demonstrate that the defendant is worthy of belief.

The Kenny case in attempting to prove that the machine is perfected relies upon the experiments of Father Summers who is the head of the Department of Psychology of the Graduate School of Fordham University. For seven years he was a professor of physiology at the Medical School of Georgetown University and has done extensive research work and private study in Europe, especially at the University of Vienna.

The instrument used by Father Summers is an apparatus which was designed for the accurate recording of human emotional reactions. "This apparatus works upon the electrical phenomena developed at the surface of the body during emotional changes. According to the testimony of Father Summers there are three of these electrical phenomena, two of which are constant and the third a variable. The variable is eliminated entirely during the examination, and one of the two constant phenomena is selected by means of appropriate contact electrodes. By reason of the human emotional reactions which result upon the asking of each question, Father Summers claims to be able to separate and detect both the true and the false answers made by the subject. The claim made for its accuracy and reliability is based upon a study which covered more than six thousand individual tests."

Father Summers further testified that in actual examination of persons involved in forty-nine criminal cases and in many cases of non-criminal and private nature the results have indicated one hundred percent accuracy. This is to say his findings have subsequently been confirmed by further investi ation or by the results of the trial or by the confession of those who were examined.

Judge Fitzgerald, holding to the contrary, asserted that "if there ever is devised a psychological test for the valuation of witnesses, the law will run to meet it. To justify the use of any such test there must first be proof of general scientific recognition that they are valid and feasible! The conditions in a laboratory are so dissimilar to those of a courtroom as to justify questioning the use of even a proved laboratory method.

"There is neither unanimity, nor even approximate agreement among writers upon the question whether such a devise has been perfected. Dr. Poffenberger of Columbia University Psychology Department in 24 Columbia Law Review, wrote an article disclaiming the value of the 'lie-detector'. Dr. Poffenberger wrote that 'the blood pressure test had not as yet advanced out of the experimental stage, and that it had not yet been satisfactorily established that different emotions produce such definite and distinct changes in blood pressure that they can be successfully separated and measured by mechanical processes.'

"In view of the study and observation of writers who have studied the question intensively, it can hardly be asserted that it is capable of demonstration, that there is general scientific recognition, and that the proposed test is valid and feasible."

The Forte case contained the dicta that when the machine is perfected, innumerable difficulties should be regulated before such an innovation is introduced in law. Who should determine the question to be asked of the defendant? If there should be disagreement between the District Attorney and Counsel for the defendant as to any question, how, when, and where should the controversy be determined? Should the defendant refuse to testify, would this be against the constitutional protection of self-incrimination?

The Kenny case concludes that "Objection to the use of scientific proof is not at all novel. Despite the fact that experts frequently differ in their conclusions, their testimony is received in evidence and it is left to a jury to determine which, if either, expert or experts they are going to believe and accept. In this case we were dealing with a science from which varying inferences may not be drawn. According to the testimony of the witness the deductions and the accuracy of the conclusions to be drawn from the examination are undebatable. Both upon legal principle and sound reasoning it would seem that the courts, if willing to accept and receive handwriting testimony, psychiatric testimony and other such expert opinion, should also admit in evidence testimony of the pathometer test and the results disclosed thereby when a proper foundation has been laid therefor."

Since the question involved in neither case has been presented to the Court of Appeals, the lower courts of our judicial system can formulate their opinion to agree with either case. Until the Court of Appeals has rendered a decision the question as to the admissibility in evidence of an examination under the pathometer will be debatable, depending upon what authority on the subject the court will rely.

H. R. R.

* * * *

ACCOUNTANTS - NEGLIGENCE.- A view of the New York authorities reveals that the accountants may be liable to their employer on the grounds of negligence and fraud, but only on the ground of fraud to creditors and investors.

In the case of Ultra Mares Corp. v. Touche, 255 N.Y. 170, the court decided that "the accountants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of the contract to make it with the care and caution proper to their calling. To creditors and investors to whom the employer exhibits the certificate, the accountants owe a like duty to make it without fraud since there is usually notice in the making that the employer does not intend to keep it to himself.- A different question develops when we ask whether they owed a duty to creditors and investors to make it without negligence."

"If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

The court proceeded to explain just what was meant by fraud. "Negligence or blindness, even when not equivalent to fraud is nonetheless evidence to sustain an inference of fraud. At least this is so if the negligence is gross. Fraud includes the expression of an erroneous opinion where the supporting grounds are so flimsy as to indicate there was no genuine belief back of it. It also includes the pretense of knowledge when knowledge there is none."

The latest case to be decided by the Court of Appeals on the subject is State St. Trust Co. v. Ernst, 278 N.Y. 104, in which the court said, "In the absence of a contractual relationship or its equivalent accounts cannot be held liable for ordinary negligence in preparing a certified balance sheet even though they are aware that the balance sheet will be used to obtain credit. Accountants, however, may be held liable to third parties even when there is lacking deliberate or active fraud.

A representation certified as true to the knowledge of the accountants when knowledge there is none, a reckless misstatement or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth are all sufficient upon which to base liability. In other words, heedlessness and reckless disregard of consequences may take the place of deliberate intention.

H. R. R.

* * * *

PROXIMATE CAUSE.- The Court of Appeals recently affirmed, without opinion, the case of Matter of Guardian Casualty Co., 253 A. D. 360.

In that case, as a result of a collision between two taxicabs, one of the vehicles was projected across the sidewalk against the stone stoop of a nearby building. The force of the collision dislodged several stones composing the stoop and the taxi-cab remained wedged between some of the remaining stones. A wrecking car was called to remove the taxicab about twenty minutes after the accident. In removing the cab and without any negligence on the part of the wrecking car operator (as found by the referee) the loosened stone fell onto the sidewalk and struck the deceased who stood twenty feet away. The injury so received resulted in her death. The court held that the injuries which caused death were the proximate result of the collision which caused injury to the stoop.

The court reasoned that the defendants whose acts caused the cab to be projected against the building must have foreseen the necessity of the removal of the vehicle from the sidewalk. They had reason to anticipate that parts of the structure dislodged by the blow would fall into the highway and cause injury to pedestrians. Therefore in the face of these consequences, there was no break in the chain of causation even though there was an intervening party - the owner of the wrecking car. The act of the wrecking car operator, although deliberate, was innocent and thus did not affect the chain of causation so as to relieve the original actor from liability.

The case appears to be sound, and seems to be in accord with the guiding rule laid down by Professor Beale, "If the defendant's active force has come to rest, but in a dangerous position, creating a new or increasing an existing risk of loss, and the foreseen danger comes to pass, operating harmfully on the condition created by defendant and causing the risked loss, we say that the injury thereby created is a proximate consequence of defendant's act."

J. S.

* * * *

LIABILITY OF HUSBAND FOR SUPPORT OF HIS WIFE.- The rule in New York is well settled that a husband is liable to one who fur-

nishes necessaries to his wife and children. Liability is predicated on his duty to support which raises an implied promise on his part to reimburse one who has assumed his duty. Under this principle a wife may seek reimbursement from her husband where she has been compelled to support herself out of her own separate estate. DeBrauwere v. DeBrauwere, 203 N. Y. 460.

At first glance, the recent case of Manufacturers Trust Co. v. Gray, 278 N.Y.380, appears to be in conflict with the rule enunciated in the DeBrauwere case. Here the husband abandoned his wife and she supported herself out of her own estate. She was subsequently adjudged insane. Her committee brought this action to recover moneys expended for her support before and after the judgment of incompetency. Concerning the money expended for her support before the judgment of incompetency, the court held it to be a question of fact as to whether there was any obligation resting on the husband to repay the money advanced by his wife - that if the jury found that the wife did not expect reimbursement at the time she supported herself, she would be unable to recover. This case holds therefore that a husband will not be liable as a matter of law.

The court reasoned in this way. A contract entered into by the wife to exonerate her husband from his obligation to support her is unenforceable so long as it remains executory. However, the wife may perform, and cannot claim reimbursement for the money she spent in performance. National Bank v. Guenther, 123 N.Y.568, and Pierce v. Pierce, 9 Hun 50. Therefore the jury could find that the wife spent the money for her support in performance of a possible implied contract on her part.

It is apparent that the committee may recover money expended for her support after the judgment of incompetency because at that time she was unable to elect to support herself. The obligation of her husband to support her while adjudged incompetent arises by operation of law.

J. S.

* * * *

RECENT WAGNER ACT DECISIONS.- (1) N.R.L.B. v. Bell Oil & Gas Co., 98 Fed.(2d) 406.

The National Labor Relations Board in this case sought to enforce its order against the respondent under §10 (c). The Circuit Court of Appeals refused to enforce the order on the ground that it was not supported by any substantial evidence. Most of the evidence on which the Board based its decision was hearsay and non-expert opinion. The Court declared that a suit to enforce an order of the N.L.R.B. is a judicial proceeding and that it will not consider irrelevant, immaterial, nor incompetent evidence.

This decision that the rules of evidence prevailing in

courts of law and equity are controlling in a suit to enforce an order of the Board will necessarily put the Board in a difficult situation. The N.L.R.A. §10 (b) says: "In any such proceeding (before the Board) the rules of evidence prevailing in courts of law and equity shall not be controlling." Yet the effect of this is wholly nullified if the Board has to resort to the Court to enforce its order.

Section 10 (e) declares: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." An appeal from this decision to the Supreme Court of the United States will put it squarely up to the Court to decide whether the word "evidence" as used in this clause means evidence as defined by Congress in §10 (b) or evidence as defined by the usual legal rules.

(2) Fansteel Metallurgical Corp. v. N.L.R.B,, 98 Fed.(2d) 375.

This case is concerned with the status of the sit-down strike under the Wagner Act. The Circuit Court of Appeals set aside the order of the National Labor Relations Board. The Board had found that the employer had refused to bargain collectively with a union constituting a majority of the employees. The employer claimed that these men had been properly discharged for conducting an illegal sit-down strike. The Board held that the Company had violated the N.L.R.A. by employing labor spies and contributing to the support of a certain union.

The Court agreed with this holding. The difference of opinion came where the Board declared that since the sit-down strike was brought on by unfair labor practices, a discharge by the company during the strike of those engaged in it was ineffective. The Court overruled the Board on this point, holding that a discharge in this situation did end the employer-employee relationship. This would mean that these men could no longer be considered in determining whether the Company had thereafter refused to collectively bargain with the union as required by the Act. Insofar as industrial peace is concerned, it means that when a labor war has been declared under certain circumstances, there is no duty on the employer to treat with employees for a peaceful settlement. This can hardly be said to be conducive to orderly termination of labor-employer disputes.

H.G.T.

LAW REVIEW BOARD

H. Gordon Turner, Editor-in-Chief

Associate Editors

Emile Stanislaus Bartle
Richard Bell Congdon
Russell Frank Crego
James Westcott Moore
Hugh Ross Elwyn
John Ross
Clarence Henry Girard
Harry Robert Rosenblum
Joseph Serino

TABLE OF CONTENTS

ARTICLES

The Exemption of A Governmental Instrumentality from Taxation..... 42

Contributory Infringement of Patents..... 52

Res Judicata..... 58

NOTES

Interstate Commerce - N.R.L.B. Jurisdiction... 63

Admissibility of Lie-Detector Tests..... 64

Due Process of Law in Administrative Proceedings..... 65

Corporations - Loft, Inc. v. Guth..... 67

In re Verser-Clay Co..... 68

Wallace v. Hudson-Duncan & Co., 98 Fed.(2d) 985..... 69

Worcester County Trust Co. v. Riley, 302 U.S.292..... 71

Full Faith and Credit under Federal Constitution..... 72

THE EXEMPTION OF A GOVERNMENTAL INSTRUMENTALITY FROM TAXATION

There is a rule of constitutional Law that neither sovereignty, State nor Federal, may interfere by taxation with the functions and agencies of the other. We of the present day accept this as being the law, but why? It is nowhere to be found expressly stated in the Constitution, and the United States is said to have a written Constitution. If we are pressed for an answer, we say, "Why, the Supreme Court declares it is the law; and we must accept their decision."

The Constitution is a document which is stated in convenient generalities. Much has to be read into it, instead of taking things out of it, as we are accustomed to do when dealing with the substantive law of New York State. Often this becomes irksome to students who like to have definite rules that are logically interpreted and distinguished. At times, Supreme Court judges are confronted with a desirable piece of legislation which they wish to declare constitutional, and they often seize on trivialities and forced interpretations to overrule an old decision in order to uphold one they believe to be for the best interests of the whole country, in view of changed conditions. Many times decisions depend on whether the majority of the bench is made up of conservative or of liberal judges.

Chief Justice Marshall stated his reason why such a general document was necessary when he said, "A constitution, to contain an accurate detail of all the sub-divisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, required that only its great outlines should be marked; its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."

The theory that a state may not interfere by taxation with functions and agencies of the Federal Government is the brain child of Chief Justice Marshall, which he developed in McCulloch v. Maryland (1819), 4 Wheaton 316. That case arose in 1818 when Maryland passed a statute which imposed a tax on all banks and branches thereof, in the State of Maryland not chartered by the Legislature. At that time, the Bank of the United States was incorporated pursuant to an act of Congress passed in 1816, and organized in Philadelphia. A branch bank was established in Baltimore, which issued currency, and ignored the taxing provisions in the Maryland Statute. The plaintiff sued to recover certain penalties imposed under the statute. The court held that unlike the Articles of Confederation, there is no phrase in the Constitution which excludes incidental or implied powers, but it, on the contrary, gives

Congress the right to employ any means which are necessary and proper for carrying into execution the foregoing powers. To employ means necessary to an end is interpreted as "any means calculated to produce an end, and is not confined to those single means without which the end would be entirely unattainable." Thus it may employ a corporation, if in their judgment it is a means necessary to a constitutional end.

The power of taxation is an incident of sovereignty and is coexistent with it. All subjects over which the sovereign power of the state extends, are objects of taxation. The sovereign power extends to everything which exists by its authority, but it does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. Those powers are not given by the people of a single state, but by the people of the United States to a Government whose laws, made in pursuance of the Constitution, are the supreme law of the land; consequently, the people of a single state cannot confer a sovereignty which will extend over them, and an attempt to tax the means legitimately employed by the Federal Government, is itself an abuse, because it is an usurpation of power which the people of a single state cannot give. The power to tax, is the power to destroy.

The power to destroy may defeat and render useless the power to create; therefore, there is a plain repugnance in conferring upon one government a power to control the constitutional measures of another, which other with respect to those very measures is declared to be supreme over that which exerts the control. The question is in truth one of supremacy. While the power in the general and state governments is acknowledged to be concurrent, still the people of all the states have created a general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves are represented in Congress, and by their representatives exercise this power. When they tax chartered institutions of the states, they tax their constituents, and these taxes must be uniform; but, when a state taxes the operations of the Government of the United States it acts upon the measures of a Government created by others as well as themselves for tne benefit of others in common with themselves. The difference is that which always exists between the action of the whole on a part, and the action of a part on the whole; between the laws of a government declared to be supreme and those of a government which, when in opposition to those laws is not supreme. This opinion does not prevent a tax on real property of the bank, nor a tax on the interests of the citizens of Maryland in the Institution. But it does declare this tax unconstitutional, because it is a tax on the operations of the bank, an instrumentality employed by the Government of the Union to carry its powers into execution.

Later, in Collector v. Day (11 Wallace 113), the other side of the rule was expounded; that the Federal Government may not interfere by taxation with the instrumentalities of the State Government. That was a case in which a tax was collected upon the salary of a county judge under a Federal Income Tax Law.

The court held that the right to establish a judicial department is one of the reserve powers of the States. It is one of the sovereign powers vested in the State, which remained unaltered and unimpaired by the Constitution. In respect to the reserved powers, the State is a sovereign, and as independent as the general government; and if the means and instrumentalities employed by the Government to carry into execution the powers granted to it are necessary, and for the sake of self-preservation exempt from taxation by the states, why are not those of the states, depending upon their reserved powers for like reasons equally exempt from Federal taxation? In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation, as any government whose means employed in conducting its operation if subject to the control of another and distinct government can exist only at the mercy of that other government.

The question of the validity of the intergovernmental taxes has been raised quite frequently in recent years, probably because the cases have not developed a clear-cut line of distinction. The basic principle seems clear enough: one government may not interfere, by taxation, with the functions, agencies, and instrumentalities of the other, but a tax is not invalid unless a governmental function or agency is directly involved, and is, or may be, hampered by the tax.

There are two questions involved in applying the principle: When is an agency governmental, and what constitutes interference? The following opinion in Metcalfe & Eddy v. Mitchell, 269 U.S.514, states the question and admits the difficulty, if not the impossibility, in answering them with finality. In that case consulting engineers were employed on a public water supply and sewage disposal project. Their rights and duties were defined by a contract whereby they were to use their best professional skill to bring about the desired results, and they were not controlled by the Government as to the details. They took no oath of office and were free to accept other concurrent employment. Their work was not of a continuous character. They paid a Federal income tax on their salary under protest, and sought to get it back, claiming that the tax was invalid, because it was taxed on the agency of a state. The court held: There is no precise formula as to the governmental immunity from taxation, but recourse may be had to the reason on which the rule rests. Its origin was due to the essential requirements of our constitutional system that the Federal Government must exercise its authority within the territorial limits of the states, and rests upon the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue influence.

Taxation by either State or Federal Government affects in some measure the cost of operation of the other, but the limitation upon the taxing power of each, must receive a practical construction, which permits both to function with a minimum of interference, each with the other. Also, the nature of the governmental agency, and the mode of their constitution may not be disregarded in passing upon the question of tax exemp-

tion. Obviously, an agency may be of such a character, or so intimately connected with the performance of a duty, or by one government that any taxation of it by the other, would be such a direct interference with the functions of the government itself as to be plainly beyond the taxing power. It is on this principle we have held that any taxation by one government of the salary of an officer or employee of the other, or the public securities, or an agency created or controlled by the other, exclusively to enable it to perform a governmental function is prohibited. But here, the tax is imposed upon the income of one who is neither an officer nor employee of another government, but upon an independent contractor in the general practice of his profession. His contract is not unlike a contract to sell and deliver a commodity. A tax is imposed without discrimination upon income, whether derived from services rendered to the state, or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of the Government in any technical sense, and the tax itself cannot be deemed an interference with government, nor an impairment of the efficiency of its agencies in any substantial way. We do not say, however, that there may not be interference with such a contract relationship, but when we inquire into the effect of this particular tax on the functions of the state government, we do not find that it impairs in any substantial manner the ability of the plaintiffs to discharge their obligations to the state, nor the ability of the state or its subdivisions to procure the services of private individuals to aid in their undertaking. Thus, we see from this case that even though a tax is imposed on the income of an agent of the state, it is not exempt unless the tax impairs in some substantial manner the efficiency of the state.

In Brush v. Commissioner of Internal Revenue, 300 U.S.352, we get an idea of what a State governmental instrumentality is, within the meaning of the rule. There, the plaintiff, Chief Engineer of the Bureau of Water Supply of New York City paid under protest an income tax on his salary. He claimed he was exempt. The answer depends upon whether the water system is conducted in the exercise of the city's governmental functions, as a Treasury regulation exempts on all governmental agencies. The Court held the phrase "governmental function" has been qualified by the Court. It is limited to those agencies and instrumentalities, which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business. The immunity from taxation was related to essential governmental functions of the State. The State cannot withdraw sources of revenue from Federal taxing power, by engaging in businesses which constitute a departure from usual governmental functions, and to which by reason of their nature, the Federal taxing power normally would extend.

Immunity is not established because the State has the power to engage in the business for what it conceives to be the public benefit. The limit of the Federal taxing power is in respect to activities in which the states have traditionally engaged. In determining whether the State is acting in its governmental or corporate powers, we put aside the States' decisions in tort actions, because in such actions many governmental functions are

deemed corporate to escape the injustice of recognizing technical defenses based upon the governmental character of such corporations when sued for its negligence, etc. Here we have a question of national scope to be resolved in harmony with the implied constitutional provisions based on general application, and the question is not controlled by local law. So, in line with the general decisions we hold it is a governmental function.

In considering the immunity of Federal instrumentalities from State taxation two factors may be of importance, which are lacking in the case of a claimed immunit of State instrumentalities from Federal taxation. Since the acts of Congress, within its Constitutional powers are supreme, the validity of State taxation of Federal instrumentalities must depend (a) on the power of Congress to create the instrumentality, (b) its intent to protect it from State taxation. Congress may curtail an immunity which might otherwise be implied (Van Allen v. Assessors, 3 Wallace 573) or enlarge it beyond the point, where Congress being silent, the Court would set its limits. (New York v. Supervisors, 7 Wallace 27). In McCulloch v. Maryland, the state tax was so inconsistent with Congress' constitutional action in establishing the bank as to compel the conclusion that Congress intended to prohibit application of the tax to the Federal Bank Notes.

We have also seen in McCulloch v. Maryland that the tax there was not upon the property of the Bank, but upon one of its operations, in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the Bank as agent. It was a very different thing in both its nature and its effect, from a tax on the property of the Bank. There is a clear distinction between a tax upon the property of a government agent and a tax upon the operation of the agent, acting for the Government. The property of an agent of the general Government may be subjected to a State tax. Railroad Company v. Preston, 18 Wallace 5, discusses this proposition. There, the State of Nebraska put a tax upon the real and personal property, but not on the franchise, of the Union Pacific Railroad, a corporation chartered by Congress for private gains. The stock was privately owned, but Congress assisted by donations of public lands, and by loans. The Corporation was subject to regulation by Congress, and was to keep the railroad and telegraph lines in good repair and use, and at all times was to transmit dispatches and transport mail, troops, and munitions of war, etc.

The defendant claimed the State was taxing an instrumentality of Congress, and that the tax was invalid. The Court held that the company was an agent of the general Government designed to be employed, and actually was employed in the legitimate service of the Government, both military and postal, but that it did not necessarily follow that its property is exempt from State taxation. Exemption of Federal agencies in State taxation is dependent, not upon the nature of the agents, nor upon the motive of their constitution, but upon the effect of the tax; that is, upon the question whether the tax in truth deprives them of power to serve the Government, as they were intended to serve it, or does hinder the efficient exercise of their power. The tax upon their property has no such necessary

effect; it leaves them free to discharge the duties they have undertaken to perform. The tax would have been invalid, only if it had been imposed upon the corporate franchise, or its right to exist and perform the functions for which it was brought into being, for in such a case it would be a tax upon its very operation, and thus, a direct obstruction to the exercise of Federal power. Here the burden on the Government, if any, was remote and indirect.

Since, as we have seen, there is no definite rule, we find as we should expect, cases, between which, a strictly logical distinction is hard to find, and yet, which reach opposite conclusions. Below are six cases, three of which were declared unconstitutional and three constitutional:

In Panhandle Oil Company v. Mississippi, 277 U.S.218, a Mississippi State law provided that any person selling gasoline shall pay for the privilege of doing business an excise of four cents a gallon upon the sale of gasoline. The State sued to recover taxes claimed on account of sales made by appellant to the United States for the use of its Coast Guard Fleet and its Veterans Hospital. The Court held that the validity of its taxes is to be determined by the practical effect of enforcement in respect of sales to the Government. The charge is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the buyer is required to make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of the tax depends immediately upon the number of gallons. To use the number of gallons sold to the United States as a measure of the privilege tax is, in substance and legal effect, to tax the sale. The necessary operation of the law is directly to retard, impede, and burden the exertion by the United States of its constitutional powers to operate the fleet and the hospital.

In Indian Motorcycle Company v. United States, 283 U.S. 570, a sale of motorcycles to a city by an independent contractor was held immune from Federal sales tax.

A further step was taken in Graves v. Texas Company, 298 U.S.393, in which a State tax on the storage of gasoline was held inapplicable to gasoline ultimately sold to the United States on the ground that the sale necessarily includes storage, and a tax upon the latter was as bad as a tax on the sale of it to the Government. Justice Cardozo dissented, claiming that it was a tax on the privilege of doing business. He said "The company must make a payment to the State upon the termination of the storage, whether the purpose of the withdrawal be a sale or something else. It is not transformed into a tax on the privilege of sale, because it is measured upon the amount withdrawn." The minority opinion carries the Panhandle case to new bounds by ruling that "A tax upon anything so essential as the sale of gasoline to the United States is as objectionable as would be a tax upon the sale itself." I think that the burden, if any, upon the activities of Government is remote and indeterminate.

In Trinity Farm Construction Co. v. Grosjean, 291 U.S.466, it would seem that the tax has the same ultimate incident as in the Panhandle case. There, Louisiana put a five cent tax on all gasoline used and consumed in the State. Plaintiff imported gasoline into the State for use in operating machinery in constructing levees on the Mississippi River under a contract with the Federal Government. The Court held that, "a tax is not laid on the choice of means, the making of contracts, the contracts themselves, nor any transaction to which the Federal Government is a party, nor in which it is immediately nor directly concerned; nor is the execution laid or dependent upon the amounts, net or gross, received by the contractor. The Appellant is an independent contractor and not a Government instrumentality. Louisiana is concededly free to tax the machinery, storage tanks, tools, etc., used in the performance of the contracts. These things are as closely connected with the work as is the gasoline used. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of State taxes imposed on the property and operations of the Appellant, at all, affects the Federal Government, it as most gives rise to a burden which is consequential and remote and not to one that is immediate, necessary, or direct. I think this case can be logically distinguished from the Panhandle case.

In the latter case, the conducting of a coast guard and a veterans hospital were directly governmental functions, whereas, in this case the function exercised - while governmental in the sense of being for the benefit of the people to build levees,- was individual. There would be no question if the Government itself were constructing the levees that this subject matter would be not taxable, but here we have a private concern operating for profit, and the burden, if any, on the Government is indirect and remote.

In Wheeler Lumber Company v. United States, 281 U.S.573, a tax on transportation charges was held valid as to goods sold to a county.

In Liggett and Myers Co. v. United States, 299 U.S.382, the Federal Government put a tax of eighteen cents per pound on tobacco manufactured in, or imported into, the United States, and sold by manufacturer or importer, or removed for consumption or sale. The State of Massachusetts purchased from Plaintiff tobacco for use in State hospitals. The Court held, It was a tax on the manufacture of tobacco, and not on the sale thereof, notwithstanding the fact that the time limited for payment of the tax occurred when the product was sold or removed. In view of the practice of affixing required revenue stamps without regard to sale or removal, and the fact that Congress considers this an excise, and not a sales tax, as they did in the Indian Motorcycle case it is valid and imposes no burden, since the effect on the State is incidental and indirect, and therefore permissible. The tax indicates no purpose to impose a tax upon either sale or removal.

The last two cases can be reconciled with the Panhandle and the Indian cases, as here the taxable event precedes the sale, but they cannot be reconciled with the Graves case, as

surely transportation is as much a part of the sale as is the storage. The Court could adopt a subject matter test. (Thus distinguishing Panhandle from Wheeler, the former being closer to the governmental agency than the latter). Or the Court could adopt an ultimate incident test, but any test would require the overruling of some cases, and a clarification of the entire subject. This has been done before and such action has been urged upon the Court, which may explain the many recent cases.

In Educational Films Corp. v. Ward, 282 U.S.389, we see a classification in which franchise taxes are held valid. There, a New York statute levied a tax on domestic corporations for the privilege of exercising its franchise in the State. The measure of the tax was the net income from any source. Appellant claims that copyrights and all income derived therefrom are immune from State taxation, since they, like patents, are instrumentalities of the Federal Government, and that the tax measure by net income is void, so far as the measure includes income from copyrights. The Court held that the tax is valid. An excise tax may be measured by tax-immune property. There is a logical and practical distinction between a tax laid directly upon all of any class of governmental instrumentalities, which Congress impliedly forebids, and a tax such as the present, which can in no case have any incident unless the taxpayer enjoys the privilege, which is a proper object of taxation, and which would not be open to question if its amounts were arrived at by any other non-discriminatory method. The Court is not intent upon a mechanical application of the rule that governmental instrumentalities are immune from taxation regardless of the consequences to operations of the Government. The purpose of the rule is the preservation of each government within its own sphere, of the freedom to carry on those affairs committed to it without undue influence by the other. If, as in the case here, the purpose of the tax was specifically to reach the income from tax-exempt national or municipal bonds which had not previously been included in the tax, it would be unconstitutional. For it cannot do indirectly what it is directly forbidden to do.

Income taxes present the same questions. The Metcalfe case is a leading one, and it is quite easy to see that the State was remotely affected, just as it is fairly easy to see a direct effect in the Day case. In all of these income tax cases two questions must be answered: Is the taxpayer a governmental officer, and is the Government directly affected?

Willcutt v. Bunn, 282 U.S.216, presents an interesting decision of an income tax case. Respondent in 1919 purchased as an investment, bonds issued by various counties and cities in the State of Minnesota. In 1924 he sold these bonds, realizing a net profit of $740, from which was deducted a net loss of $45. He paid under protest an income of $695, and sued to recover this tax. The court held that a tax upon the obligations of a State or its political subdivisions falls within the Constitutional prohibition as a tax upon the exercises of a borrowing power of the State. But the power to tax is no less essential than the power to borrow money, and in preserving the latter it is not necessary to cripple the former by extending the constitutional exemption from taxation to things where no direct burden is laid upon the governmental instrumentalities, and there is only a re-

mote, if any, influence upon the exercise of the functions of government. The principal and interest of the obligations constitute the contract made by the State, and to tax upon those amounts, payable upon the terms of the contract, has been regarded as bearing directly upon the exercise of the borrowing power of the Government. But a sale of bonds by their owners, after they have been issued by the State is a transaction distinct from the contract and the profits from such sale, are in a different category from income from interest payable on the bonds. It would be far fetched to say that such sales are instrumentalities of the State. They are not transactions made directly or indirectly in behalf of the State, nor in the course of performance of any duty of the State; nor does the tax of such sales as a practical matter lay such a burden upon the exercise of the State's borrowing power as to make it necessary to deny the Federal Government the constitutional authority to tax.

In Helvering v. Therrell, 303 U.S.218, a liquidator of state banks who was appointed by the comptroller, a counsel employed by New York Insurance Department in Liquidation Bureau, and counsel employed by the Pennsylvania Department of Justice to wind up the affairs of banks, were all required to pay Federal income taxes.

In Helvering v. Berhardt, 304 U.S.405, the salary of employees of the New York Port Authority, a corporation created by a compact between New York and New Jersey, to build with public capital bridges and tunnels between New York and New Jersey, and which are exclusively owned by the public, were held taxable by the Federal Government. The dissenting opinion distinguished this case fr m the Brush case (supra). In that case the Treasury regulations exempted the salaries of all employees of a governmental agency. Here there is no such regulation, and the majority opinion held that this was not a governmental agency within the meaning of the exemption rule, which is limited to essential governmental agencies. Essential governmental agencies mean those agencies, without which, a State could not exist as a governmental entity. Those functions which could be carried on by private enterprise are not exempt from taxation even though taxes are paid out of the State treasury. It further held that the immunity of state activities does not extend to a tax laid on individuals and affecting the state only as the burden is passed on it by the taxpayers when the burden on the state is so speculative and uncertain that if allowed, it would restrict the Federal taxing power without affording any corresponding tangible protection to the state.

I think I should mention the concurring opinion of Justice Black in Helvering v. Gerhardt, as it reflects the Roosevelt administration's contention upon the subject. He said, "I concur in the result, but I find it difficult to resolve this result with the principle in Collector v. Day, and later decisions. This leads me to the conclusion that we should re-examine that rule." He further says, "Surely, the Constitution contains no imperative mandate that public employees or others drawing equal salaries (income) should be divided into tax paying and non-taxpaying groups. Ordinarily, such a result is discrimination. Uniform taxation upon those equally able to bear their fair share of the burden of government is the objective of every just government.

The language of the 16th Amendment to the Constitution, empowering Congress to collect taxes on incomes 'From whatever source derived', given its most obvious meaning, is broad enough to accomplish this purpose." While no one concurred with Justice Black in this opinion, we cannot say that it may not become the prevailing opinion in the near future, especially when we consider that Justice Reed did not take part in this case, and Roosevelt has at present one appointment fill, and in all probability will have more before his term expires.

Allen v. Regents, 304 U.S.439, shows us another example where the function is not essential. A Federal tax on admission to football games was upheld against a claim that the taxpayer was a State University (Georgia) and the State was engaged in a governmental activity in running the University. The Court held: When the State engages in a business which normally would be taxable the fact that it is exercising a governmental power does not confer immunity.

Other miscellaneous cases of interference are: Frank v. Mangum, 237 U.S.309, which held that Federal Courts may by habeas corpus release prisoners held by state courts; Second Employers Liability Cases, 233 U.S.1 held that Congress may require state courts to administer Federal Employees Liability Act; Ex parte Willman, 277 Federal 819, held that mail trucks need not comply with local regulations as to licenses for drivers; State v. Burton, 41 R.I., 303, held that soldiers obeying orders may disobey speed laws. As to interference by states with United States, Hump Hairpin Co. v. Emerson, 258 U.S.290, held that the state may tax net income of corporations without allowing deductions from United States bonds.

There have been several thousand cases decided on this rule of law in the highest courts of the several states, and the United States Supreme Court. The reason for so many cases, obviously, is that the rule of law necessarily is indefinite, and it is only by the slow process of judicial decisions, that the rule of law will become definite and certain. Because the rule is so indefinite, I have avoided giving my interpretation of the law, but instead I have endeavored to present the reasoning of the judges, and the justification for their decisions in a few of the key cases.

EMILE STANISLAUS BARTLE

CONTRIBUTORY INFRINGEMENT OF PATENTS

Three score and seven years ago our courts brought forth in the field of patent law a new concept, conceived in justice, and dedicated to the proposition that all patentees should have their rights adequately protected.

In general parlance a reference to a sixty-seven-year-old infant might well connote a bewhiskered, elderly man with renewed interest in things juvenile, but in the field of law, sixty-seven years is but the age of an adolescent child of patent law, contributory infringement.

For it was in the year 1871 that this doctrine was first clearly announced, in Wallace v. Holmes, Fed.cas.No.17100. In that case the plaintiff had a patent on a combination chimney and burner for a lamp, in which combination neither element alone was patented. Defendant made and sold the burner, to which the vendees added the chimney and completed the invention. In his defense to plaintiff's infringement action he contended that he had neither made, sold, nor used the patented combination. But the court held him liable for contributory infringement since he was the active party in the infringement which occurred and the only party amenable to effective judicial process.

Necessity.

This doctrine was not based upon a foundation built of the concrete blocks of sound logic, but rather took root and grew from the fertile soil of practical necessity. Without it combination patents would be practically worthless in most cases, for there would be no real protection for the inventor to be able to sue innumerable individual infringers for small sums of money. And since the whole purpose of the patent law is to provide protection for inventors, the consideration of the courts must be directed at making that protection effective. "Accordingly, under a theory of contributory infringement the patentee has been allowed to proceed directly against any manufacturer or vendor of elements clearly designed for use in a patented process or in the making or reconstruction of the patented combination." Yale Law Journal, Vol. XL, page 1329.

Definition

The theory of contributory infringement is now formally established, and has come to have a clear meaning, which is subject to a reasonably precise and concise definition. Infringement is the making using, or selling of something defined by a claim of the pantent without authority or a license from the patentee.

"Contributory infringement is intentional aid or co-operation in transactions which collectively constitute complete infringement." El Dorado Foundry Machine & Supply Co. v. Fluid Pack Pump Co., 81 F (2d) 782.

There are certain elements which distinguish contributory infringement from simple infringement. The infringement is the completed act which encroaches upon the rights granted in the

patent, but contributory infringement is something less; it is some act which encourages, induces, aids or enables another to accomplish the completed wrong. The final act is a tort, and those acts which help to make the wrong possible also become torts if they are intentional. As in many torts the intent is necessary. As stated in the case of Carbice Corp. of America v. American Patents Development Corp., 283 U.S. 27, "infringement, whether direct or contributory, is essentially a tort, and implies invasion of some right of the patentee." The essence of contributory infringement lies in concerting with others in unlawful invasion of the patentee's rights and an intent to aid is necessary.

Extent

It is also necessary that there should be a completed infringement in order that financial liability may be imposed, or at least that defendant's act should be one which has for its purpose or net result a completed act of infringement in order that it may be restrained. "The allegation of contributory infringement cannot be supported, there having been no possibility of complete infringement, and there is no such thing as partial infringement." Harvey Hubbell, Inc. v. General Electric Co., 267 F. 564.

The act constituting contributory infringement may consist of any participation or co-operation in effectuating the final result. It generally arises in the form of sales, made by the party charged, of elements which enter into the infringing article or act. But it may occur in the form of loans made to finance the infringement or in the form of services helping to accomplish the result. In Ames Safety Envelope Co. v. Randall, 19 Fed. Supp.613, which is one of the most recent cases, decided in 1937, it was held that "a bill to enjoin infringement of patents should be dismissed as to a defendant making an outright business loan to the co-defendant without knowledge that the money was to be used to make alleged infringing device, or knowledge of any controversy between such co-defendant and plaintiff as to former's right to make device." From that it may be seen that in a proper case the loan of money may constitute contributory infringement. In this case the only element that was lacking was the intent. In Ruth v. Stearns-Rogers Mfg.Co., 13 Fed. Supp.697, it was said that the sale of part or an element of a combination without authority from patentee, with the intent and for the purpose of bringing about its use in such a combination, constitutes contributory infringement; and this is not altered by the fact that there is no completed infringement until the articles have left the hands of the vendor and he no longer has any control of them, as may be seen from the statement in Radio Corp. of America v. Andrea, 90 F.(2d) 612, to the effect that where elements of an invitation are sold in substantially unified and combined form, infringement may not be avoided by separation or division of parts, leaving to the purchaser the small task of integration.

But the ban does not extend to every sale connected with the infringement. In the case of American Ball Co. v. Federal Cartridge Co., 70 F.(2d) 579, it was stated that those who deal in the unpatented product of patented machines do not thereby

render themselves liable as contributory infringers of the machine patent.

And in the case of the Duplex Envelope Co. v. Denominational Envelope Co., 80 F.(2d) 179, it was established that the sale of an article of commerce of ordinary use, without relation to any apparatus, does not make the manufacturer guilty of contributory infringement, although the buyer makes use of the article in an infringing apparatus.

But in spite of that statement in the Duplex case, it is easily possible for the sale of a general article of commerce to constitute an infringement. The vendor of ink was made liable in the case of Henry v. A.B.Dick Co., 224 U.S.1, where it was held by the court that it was "contributory infringement for Henry to sell to the limited licensee ink suitable for use therein, with knowledge of the license agreement, and with knowledge that it would be used in connection with the mimeograph, yet the ink was not susceptible of that use only. Indeed, in those cases in which the article is only adapted for infringement, the tort is only because the defendant has aided in the ultimate infringement. Where the use is ambiguous, the plaintiff must, of course, show that it was part of the defendant's plan that the infringement should follow; but, if he can show that, the defendant has contributed as much to the tort as though the article could be used in that way only."

In any case where the article is clearly a necessary element of the patented product, and does not merely constitute replacement or repair, it is not difficult to determine the fact of infringement. But the cases which are most numerous are those which involve an element which seemingly works with the patented article or upon which the patented article acts. These have been the subject of great deliberation by the courts, which have finally led to rules which reasonably distinguish the cases.

The classic contributory infringement case is the Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U.S.325, which involved the Victor Company's patent covering the combination of a disc record and a stylus, where the stylus was not pushed across the record but was suspended on a movable arm, which was moved across the record by the tendence of the needle to follow the groove. The stylus was not patented, and the patent on the record, which embodied a new method of sound recording, had run out, but the combination of the two was still patented. The Leeds & Catlin Company made records for use with Victor Machines, and was sued for contributory infringement. The Supreme Court held that every time a record was put into the machine there was a new manufacturer of the combination requiring a license from the patentee; that the license, which the Victor Company gave to purchasers of its machines, extended only to new manufactures of the combination with records purchased from the Victor Company, and did not authorize the making of the patented combination with records bought from third parties. The court, therefore, enjoined the Leeds & Catlin Company from selling records so as to enable users of the Victor machine to violate the patent rights.

This case was a very important step forward, as it was a new

and unique decision at the time it was handed down. It has formed the basis for many additional decisions, all of which evidenced the same expanded protection provided for the patentee.

The rule has been soundly applied in two cases, which more clearly exhibit the reasonableness and necessity for such protection, Belknap v. Wallace Addressing Machine Co.,Inc., 102 F. (2d) 602, and Individual Drinking Cup v. Errett, 300 F.955. In the Belknap case plaintiff had a patented addressing machine. The patent covered the machine and a series of stencil cards, which co-operated with the other elements of the machine. Defendant made no machine, but manufactured and sold stencil cards, adapted to the machine, to plaintiff's customers. The stencil cards could be used indefinitely and the only reason why new cards might be needed would be for new work, and not as a substitute for worn-out cards. The stencil was one of the elements of the combination, without which the machine was useless. Because of such sales the defendant was held liable for contributory infringement. It is clear that the cards were not merely replacements of a minor nature, but were a new and vital part of the whole patented product

Paper cup vending machines were the subject of the Individual Drinking Cup case, in which the action was to prevent the sale of cups for use in machines which infringed plaintiff's patent. The words of the court are clear in passing judgment, "without cups these machines cannot be used, and unless they are used they cannot infringe the patents in the hands of customers. Anyone who sells cups with knowledge that they must be used by the infringing machine, therefore directly contributes to the eventual infringement, and does so with his eyes open."

Limitations

There is a limitation upon the doctrine, applied in the Morgan Envelope Case, 152 U.S.425, which permits any purchaser of the patented combination to purchase for repair or renewal purposes, and any third person to supply him, without infringement, an active, renewable part of the combination.

This viewpoint is more fully expounded in the article in the Yale Law Journal cited above, where the idea is propounded that unless the doctrine of contributory infringement is limited in its application, "to the supply of integral elements with a life span not materially shorter than that of the patented device itself, it would tend to destroy the purchaser's privilege to replace quickly depreciable and unpatented elements of a patented combination. Therefore, for the purpose of adequately protecting the patentee against reconstructions, and yet preserving the purchaser's rights to repair and use, a working distinction first formulated in the Leeds & Catlin case has been drawn between products upon which the machine operates, and which must be renewed periodically whenever it is put to use, and those elements which, although renewable periodically, actively co-operate with the remaining elements of the machine in the performance of its functions; and the interdict of contributing infringement has been limited to the supply of elements in the latter case."

There is no desire on the part of the courts to interfere with the commercial traffic in unpatented articles, and therefore, they have steadfastly refused to extend the protection given to a point which would amount to restraint of trade. Some patentees have attempted from time to time to increase the rights of restriction by license or otherwise, so as to interfere with the legitimate dealings of third parties in unpatented materials. This practice has been repeatedly condemned by the courts. And even the knowledge of the alleged infringer of the use to which the material sold is to be put, will not aid the patentee in such practices. One of the most important cases dealing with such an attempt of a patentee to monopolize the sale of unpatented materials is that of the Carbice case, which was a suit to enjoin contributory infringement by the Car bice Company, and for an accounting of profits. The invention claimed was for a particular kind of package employing solid carbon dioxide in a new combination. The Carbice Company manufactured solid carbon dioxide. It was charged with contributory infringement because it sold its product to customers of plaintiff, with knowledge that it was to be used by the purchaser in transportation packages like those described in the patent. If the patent were valid, the owner could prohibit the manufacture, sale, or use of such packages, or it could grant licenses upon terms consistent with the limited scope of the patent monopoly. It might charge a royalty or license fee, but it might not exact as a condition of a license that unpatented materials used in connection with the invention should be purchased only from the licensor, and if it should not do so, relief against one supplying such unpatented materials should be denied. The limited monopoly to make, use, and vend an article may not be "expanded by limitations as to materials and supplies necessary to the operation of it." Motion Pictures Patent Co. v. Universal Film Mfg.Co., 243 U.S.502, 515.

The most recent U.S.Supreme Court case on contributory infringement, Leitch Mfg.Co.,Inc., v. Barber Co.,Inc., 58 S.Ct. 288, was decided upon the Carbice case. In this case the Barber Company had a process patent for the use of a bituminous emulsion in treating concrete roads during curing so as to retard the evaporation of moisture. The Barber Company's method of doing business was equivalent to granting a license with a condition that the patented method might be practiced only with emulsion purchased from it. The bituminous emulsion itself is an unpatented staple article of commerce. The action charged as contributory infringer a competing manufacturer of this unpatented material, who sold it to roadbuilders for use in this process.

Relief was denied by the court on the ground that the owner of the patent monopoly ignored the limitation inherent in the patent grant, and sought to extend the monopoly to unpatented material. By the rule of the Carbice case every use of a patent as a means of obtaining a limited monopoly of unpatented materials is prohibited. This decision stated that "it applies whether the patent be for a machine, a product or a process. It applies whatever the nature of the device by which the owner of the patent seeks to effect such unauthorized extension of the monopoly."

As was said in the Motion Picture case, it is not within

the scope of the patent monopoly to permit the patent owner to "derive its profits, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used."

Presumptions

From the question of use have evolved a few presumptions which are exercised in certain circumstances in determining the cases. If part, or an element of the combination sold without authority from patentee is adapted to any other use than an infringing one, intent to aid in the invasion of patentee's rights, is presumed, but, if the element sold is also capable of other uses, such intent must be shown affirmatively by the patentee. That is the idea expressed in the case of Ruth v. Stearns.

In an action for contributory infringement plaintiff has the burden of showing an intention on the part of the defendant to aid another person in infringing the patent, and while a person who sold an article, capable of use only in a patented combination, is presumed to have intended it should be so sold, yet where the article is also capable of other uses, an intent that it should be used in an infringing way must be affirmatively shown. Articles or materials sold by the defendant for the purpose of ause by the purchaser in an infringing manner will be assumed to have been actually so used in the absence of proof to the contrary, and the burden of showing the contrary rests upon the defeneant.

Remedy.

The remedies of the patentee are the same as in the case of infringement generally. In most cases damages might be recovered if established on sufficient evidence, but for effective results the proper rule would permit the patentee to recover profits from the offending party, and to enjoin further violation of his rights It would seem, therefore, that the present state of the law is adequate to preserve to the patentee the full benefit of the patent monopoly.

It is thus apparent that there is a complete body of law on the subject of contributory infringement, that most cases to be determined will rather definitely fall either within or without the established limitations, and that the law of this subject has reached such a state that any future decisions will have a tendency to limit rather than to extend the doctrine which has been so evolved.

JAMES WESTCOTT MOORE

RES JUDICATA

The statement has recently been made that the subject of Res Judicata is a "branch of the law on which there is little learning." 49 Law Quarterly Review 14. This article will be confined to that phase of the doctrine wherein matters adjudicated in a former action may be deemed conclusively established in a subsequent action between the same parties although the causes of action are different.

It is well to note the distinction between the two forms of Res Judicata. It is well pointed out in the case of Cromwell v. County of Sac, 94 U.S.351, 24 L.Ed. 195, wherein Judge Field stated in substance that when the causes of action are similar, the adjudication in the former is binding not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose. To illustrate, a judgment rendered on a note is conclusive on the question of validity of the instrument and the amount due, although it be subsequently alleged that perfect defenses actually existed, viz, forgery - lack of consideration, etc. But when the causes of action are dissimilar, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. Therefore when the causes of action are different, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined.

There is very little dispute about the correctness of this rule; the difficulty comes in its application.

The recent case of Karameros v. Luther, 279 N.Y.87,-and incidentally, the case which suggested this article - presents an interesting application of the latter rule. This action was brought by a husband to annul a marriage entered into in 1931. The wife had formerly sued for a separation on the grounds of cruelty. The husband in the former case put in a general denial and further alleged that the parties were never married. The court dismissed the action on the merits for failure to prove a cause of action for separation. The court further found, however, that the parties were legally married in 1931. The claim of the wife is that the finding of the fact of marriage is Res Judicata, the question in the instant case. The court ruled that this finding was not Res Judicata because it was not necessary to the result reached. In the separation action the wife failed to prove acts constituting cruelty and judgment went against her. The sufficiency of the acts was the only material issue decided in the case. The question of marriage, as it turned out, was not a material issue and therefore that finding could not be binding in the instant case.

Therefore the question arises, what facts are to be considered material and necessary to the former judgment? In Fish v. Fish, 254 N.Y.463, the court held that in every action for separation the primary fact to be proved is an existing marriage between the parties. Can it be said that although a certain fact must be proved to sustain a cause of action, that fact may yet be considered immaterial to the determination reached? According to the Karameros case (supra) and other authorities, the question can be properly answered in the affirmative.

In stating the rule concerning the question of Res Judicata in dissimilar actions, between the same parties, the courts have not all used the same terminology and this is apt to be confusing. Many of the authorities state the rule substantially thus: In order that a fact once adjudicated may operate as an estoppel in a subsequent suit between the same parties, it is essential that such fact was involved within the issues in the former case, or as expressed in other instances, was directly and substantially within the issues. Greenleaf on Evidence §782; Freeman on Judgments §690; Caspers on Estoppel 472.

Again, a great many authorities state the rule to be that, in order that a formerly adjudicated fact may operate as an estoppel in a subsequent case, it must be such as was necessarily adjudicated in the earlier suit, and that facts found which were not necessary to uphold a former judgment do not conclude the parties. 15 R.C.L. 979, 34 C.J. 927; Black on Judgments §615.

Van Vleet, Former Adjudications 1, 62 states that, "in order that a fact determined in a former case may be held to be adjudicated, it must be matter, the determination of which has become vital to the case, or the pivot, as it were, upon which the case turns, and which the judge is bound to decide in order to render his judgment final and complete."

In Lillis v. Dutch Co., 95 Cal.553, 30 Pac.1108, which contains an excellent discussion on the subject, the court said, "If the cause of action upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain as aquestion of fact what issues or matters were determined in the former action, and then to determine as a matter of law whether those issues and their determination were essential to the former judgment; for it is only issues upon which that judgment depends that the parties are estopped from litigating in any other action. Matters which were merely collateral or incidental to the former determination do not constitute an estoppel, even though they were litigated and decided therein."

Other cases, changing the phraseology somewhat, but meaning the same thing, hold that, unless it was essential that a certain fact be determined, it does not operate as an estoppel. Kerr v. Blair, 55 Tex. Civ. App. 349.

It is said in Bigelow §179 that, "the reason why there is no estoppel concerning matters not necessarily involved in the decision of a case is that, from the very fact that they were

not of the essence of the action, they would not require, and in all probability did not receive, that searching examination and scrutiny that would be given to a matter in issue the decision of which would determine the case."

To elucidate the subject further, let us return to the question as to what is meant by the term "fact directly in issue", for if a fact is immaterial, it cannot be said to be directly in issue. In Campbell v. Consabes, 25 N.Y.617, it appears that an action was brought by a mortgagor to enjoin the mortgagee from foreclosing the mortgage on the ground that the indebtedness due had been paid. The court held against the mortgagor, finding that there was due on the mortgage the sum of $2,754.88. Thereafter the mortgagee brought an action to foreclose his mortgage and contended that the question of the amount found due in the former action was Res Judicata. The court held that this question was not directly in issue in the former case, but was merely incidental and collateral thereto.

Freeman on Judgments §690 states that, "if the judgment can be correct, whether the fact in question exists or not, it is not directly in issue, and therefore, does not become Res Judicata."

Testing the Karamoras case, by the views, the case appears to be a proper application of the doctrine. There the court decided that the acts alleged by the plaintiff were insufficient to warrant a judgment of separation. That fact was the only important and necessary issue to be decided. Whether the parties were valid ly married, although material to sustain the plaintiff's cause of action, was immaterial to the determination actually reached. The judgment can stand in the absence of such finding of the fact of marriage.

In determining the materiality of the adjudication, it is apparent that the court reasons back from the judgment to determine what facts were necessary to support that result. They do not confine themselves to an investigation of the issues raised by the pleadings.

The case of Willis v. Willis, 49 Pac.(2d) 670, -a Wyoming case is in accord with the application of the doctrine in the Karameros case. In this the plaintiff brought suit to recover for services rendered to defendant as his housekeeper. In a previous action, the same plaintiff sued defendant for divorce, based on a common-law marriage. Defendant therein denied the allegation of marriage and expressly averred that the plaintiff was employed as a domesti in his home. The court found that the parties had not entered into a valid common-law marriage and dismissed the suit. Court further found, however, that plaintiff was employed as defendant's domestic. Plaintiff in case at bar claimed that the finding that she was employed by defendant is binding on defendant in the present action. Here the court decided that the finding pertaining to the nature of plaintiff's employ was not necessary to determine the action. Since the court found the parties were not legally married, whether plaintiff was a domestic was unimportant. Clearly the judgment would stand without this additional finding.

The case of Durham v. Durham, 99 A.D.450, is an illustration

of a finding that was material and necessary to determination reached. This also was an action for annulment. In the previous action the wife sued for separation and was successful. The court made the further finding that they were legally married. Wife claims that the finding of marriage has been conclusively determined. Here the court found that this finding was Res Judicata. In the action for separation, plaintiff was required to establish the existence of a valid marriage as a prerequisite to her right to judgment. Failure to establish a valid marriage would of necessity be failure to establish any duty owing from defendant to plaintiff as such duty can only arise out of a valid contract of marriage. The issue of marriage was directly involved and no judgment could proceed from the court in favor of the plaintiff therein unless it was established.

The application of this rule can readily be seen in the Dunham case, supra. In order to grant a judgment of separation, the court must find a valid marriage. Without such finding, the judgment of separation cannot stand. But as was seen in the Karameros case, a finding of marriage is unnecessary when the plaintiff has been unsuccessful in her suit. These two cases show that although the issue of marriage is a material issue to either case, yet in the one the finding is essential to the judgment whereas in the other finding it becomes immaterial in view of the final determination.

As previously stated, to be Res Judicata as to a fact, not only must that fact have been in issue and determined in the former suit, but it must have been a material fact in the case upon which the judgment in some way depended. The case of Silberstein v. Silberstein, 218 N.Y.525, is an illustration of an immaterial adjudication. In that case the wife brought suit for separation and the sole issue was whether the husband's cruelty forced her to leave him. The court found for the husband and also found that she left him with intent not to return. This latter finding was immaterial and unnecessary and the judgment does not operate as an estoppel in her subsequent suit for separation brought after she had offered to return.

The question of Res Judicata also arises where there have been several defenses interposed in the first suit. The court in the case of Almy v. Daniels, 15 R.I.312, 4 Atl.753, held that an adjudication on each defense will be held binding in a subsequent action involving the same question. In that case a suit was brought to restrain the construction of a building contrary to the terms of a contract, on land in which plaintiff claimed an interest. Defendant denied the existence of the contract and also claimed sole ownership of the land. It was held in that action that the injunction should not issue because plaintiff failed to prove such contract. But although recognizing that it was unnecessary to do so, the court went further and construed the deeds to mean that the parties were tenants in common of the land. In a subsequent action of account by the former plaintiff, the court held that the former determination as to the title was binding in this case although it was not strictly necessary to the determination reached. This case of course is a direct opposite to the Karameros case, and it goes to show that courts apply the doctrine differently. However, the better rule would seem to favor the Karameros case. The decision

made in Almy v. Daniels seems clearly in conflict with the above authorities cited and perhaps it would be best to limit that case to its own facts - where a determination of title was made.

In Sheldon v. Edwards, 35 N.Y.279, the court rendered some discussion on cases involving several defenses. To illustrate: suppose an action were brought on a draft. The defenses were that the action was prematurely brought, the draft was usurious and that it had been paid. If the court finds for defendant on all these defenses every one will be deemed Res Judicata in a subsequent action where that question arises. This seems reasonable for it is impossible to ascertain just what particular finding influenced the decision of the court. They were all instrumental in arriving at the conclusion. Compare this with the Karameros case. If, in that case, the court found as it did on the alleged cruelty but further found that the parties were not married, then no doubt the latter finding would be Res Judicata. One would be as essential to the determination reached as the other. The case could have been decided on either ground and it cannot be said that only one was necessary to the determination made. However, look at the case as it is and it can be seen that the finding of marriage was entirely immaterial to an adjudication denying the right to separation.

It might possibly be argued, that as a matter of public policy all material facts determined in a prior action should be binding in a later one, whether necessary to the result reached or not. After all the purpose of Res Judicata was to put an end to litigation and this would certainly seem to foster that purpose. However, the trend of authority seems to be the other way and consider only those facts as conclusively determined that were essential to the result reached. Such facts receive greater scrutiny from the court and may be decided with more caution.

As a final word perhaps it can be said that the one test to be applied in this phase of Res Judicata is: Can the former judgment stand if the disputed finding be eliminated therefrom? In any event, this seems to be the view expressed in the latest decision of the highest court in New York.

JOSEPH SERINO

N O T E S

INTERSTATE COMMERCE - N.L.R.B. JURISDICTION.- The jurisdiction of the National Labor Relations Board to hear and determine labor disputes extends to all unfair labor practices which "affect" interstate or foreign commerce. The particular activities which are deemed to constitute interstate commerce to the extent of permitting regulation by the Federal Government have been greatly expanded by the N.L.R.B. decisions commencing with the case of N.L.R.B. v. Jones & L.Steel Co., 301 U.S. 1, which held the business of receiving raw materials from without the State and manufacturing finished products to be shipped beyond the borders of a state constituted interstate commerce under the Constitution. The question remained as to what activities so affect interstate commerce as to be subject to similar regulation. In the case of Consolidated Edison Co. v. N.L.R.B., 83 L.Ed., No.4 p.131, the court held that the Labor Relations Board has jurisdiction in the case of intrastate utility companies which serve instrumentalities of interstate commerce.

The Consolidated Edison Corporation and its affiliates served New York City and Westchester County with gas and electric power. Pursuant to this function and incidental thereto, it supplied electricity and gas to several interstate railroads for the lighting and operation of passenger and freight terminals and for the movement of interstate trains, to the piers of steamers operated in interstate and foreign commerce, to telegraph and telephone companies for transmitting and receiving interstate messages, for transatlantic radio service, for an airport, for lighthouses and harbor lights, and light, heat, and power for post offices and other Federal buildings.

The Court in sustaining the jurisdiction of the N.L.R.B. considered the effect upon interstate commerce of an interruption, through industrial strife, of the service of the utilities. The dependence of interstate commerce was so complete that a discontinuance of service would cause an immediate cessation of all commerce in the vicinity, the consequences of which would be felt throughout the United States.

In the instant case because of the peculiarly intimate relation between the service activity and interstate commerce, justification may be found for the inclusion of the particular utilities involved within the scope of Federal regulation. The question arises, however, as to the status of utilities not situated at the nerve center of commerce in the United States. Would the broad language of the opinion include utilities located in small communities which may incidentally furnish energy to instrumentalities of interstate commerce?

As a suggestive answer to such an anticipated query the Court stated that Congress in establishing the N.L.R.B. did not attempt to deal with particular situations but left that up to the Board whose authority was to be exercised within Constitutional limitations. The "commerce" contemplated by the Act is interstate and foreign commerce. "In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle

that it is the effect upon interstate and foreign commerce, and not the source of the injury, which is the criterion.***** And whether particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to Federal control is left to be determined as individual cases arise."

Referring to the instrumentalities served in the instant case, the Court said, "It cannot be doubted that these activities, while conducted within the State, are matters of Federal concern. In their totality they rise to such a degree of importance that the fact they involve but a small part of the entire service rendered by the utilities is immaterial in the consideration of the existence of the Federal protective power." The test to be applied to a particular situation is the intangible and indefinable one of degree. In some situations, as in this case, the activities will be large and intimate enough to have, in the mind of the Court, a direct and immediate effect upon interstate commerce; in other situations the Court will consider the effect as small and remote. The distinctions between the extremes will narrow by subsequent decisions until a tenuous line will separate the spheres of state and Federal regulation. The general swing of current decisions is toward centralization to we may expect to find that jurisdiction over activities affecting interstate commerce will be broadened as was the case with instrumentalities considered to be directly engaged in such commerce.

Future decisions of the Court alone will determine how far the present trend will proceed. Until there are more adjudications, whether a utility less essentially connected with interstate commerce, or any other business serving as an indirect aid to interstate commerce, will be subject to Federal regulation remains a subject of mere speculation. As the Court said, each situation "is left to be determined as individual cases arise."

C. H. G.

* * * *

ADMISSIBILITY OF LIE-DETECTOR TESTS.- In the case of People v. Forte, 279 N.Y.204, the Court of Appeals refused to take judicial notice that the pathometer, or "lie-detector", is or is not effective to determine the truth. The case involved an appeal from a decision rendered in People v. Forte, 167 Misc. 868,which held such evidence was inadmissible. See Albany Law Review, Vol. VIII No. 1, p.36, for a discussion of conflicting opinions as to the efficacy of such tests.

To comprehend adequately the scope of the decision of the Court of Appeals, it is necessary to point out the circumstances out of which the appeal took place. In the Court below the defendant's counsel did not offer to subject the defendant to the test until after the close of the case. The defendant's counsel then moved to reopen his case and requested permission to take the defendant from King's County, the seat of the trial, to a labora-

tory in Bronx County to be examined under the pathometer. The Court denied the motion and the defendant contended that such denial constituted error as a matter of law.

In affirming the trial court, the Court of Appeals pointed out that the record was devoid of evidence tending to show a general scientific recognition that the pathometer posses efficacy.

The case does not specifically state that the "lie-detector" should not be used. The Court simply refused to take judicial notice of its value or worth. Whether, after laying the proper foundation by affirmative answers by experts to the question: Can it be depended upon to operate with complete success on persons with varying emotional stability?" a refusal of the trial court to receive such evidence would constitute reversible error, remains unanswered. The Court did say: "Until such fact (recognition of being possessed of such value that reasonable certainty can follow the tests) is demonstrated by qualified experts in respect to the 'lie-detector', we cannot hold as a matter of law that error was committed in refusing to allow defendant to experiment with it."

The whole tenor of the decision indicated that, as yet, the "lie-detector" is of questionable dependability; but the Court seemed inclined to maintain an open mind on the subject. It was pointed out that evidence relating to handwriting, to fingerprinting, and to ballistics is recognized by experts as possessing the requisite reasonable certainty. The development of the admissibility of evidence relating to these subjects indicates that the efficacy of the pathometer must obtain greater general recognition by experts before trial courts will be compelled to receive in evidence the result of an examination of a witness by a lie-detector as a deliberative test of his credibility.

C. H. G.

* * * * *

DUE PROCESS OF LAW IN ADMINISTRATIVE PROCEEDINGS.- The Fifth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty or property without due process of law." The courts have never attempted a comprehensive definition of the phrase "due process of law", preferring to arrive at its meaning "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." (Davidson v. New Orleans, 96 U.S.97). However, it may be said as a general proposition, that any statute or procedure which does substantial violence to the traditional American notions of what constitutes fairness and justice is almost sure to deny due process.

A recent example of what is not due process of law as applied to the administrative proceedings of Federal agencies is to be found in the case of Morgan v. United States, U.S. The Secretary of Agriculture acting under authority conferred

upon him by the Packers and Stockyards Act had, upon his own initiative, conducted a hearing with respect to the reasonableness of the appellant's charges for stockyard services in Kansas City. After prolonged hearings, in the course of which about 10,000 pages of transcript of oral testimony and over a thousand pages of statistical exhibits were received, elaborate findings -180 in number- were prepared by the Bureau of Animal Industry, Department of Agriculture. All this evidence had been received before the present Secretary took office. He did not hear the oral argument nor read the record. His final order fixing appellant's charges was, according to his own testimony: "my independent conclusion as based on the findings of the men in the Bureau of Animal Industry."

In arriving at these findings, however, the Government had never submitted a brief, and apart from what was said on its behalf in oral argument had formulated no issues and furnished appellants no statement of its contentions or proposed findings. Furthermore, the appellants were never given an opportunity to examine the findings of the Bureau of Animal Industry until they were served with the order fixing the maximum schedule of rates to be charged.

On appeal to the Supreme Court the appellants contended that the Secretary's order had been made without the "full hearing" required by the statute. On what constitutes a "full hearing" as a requisite of due process, particularly as applied to proceedings before Government administrative agencies, the Court reaffirms some fundamental principles which all persons interested in preserving the democratic process would do well to bear in mind.

"We assume," says the Court, "that the Secretary sufficiently understood its purport (i.e., the evidence presented). But a 'full hearing' - a fair and open hearing - requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

"No such reasonable opportunity was accorded appellants."

At the very outset of its discussion the Court recognizes that the increasing demand for social legislation has made necessary the development of new machinery for its administration, but at the same time denies the right of an administrative board to ride rough-shod over constitutional guarantees designed for the protection of individual rights. Socially desirable ends do not, yet, -at least in America- justify government by decree. Americans still have some regard for means as well as for ends; fundamental concepts of liberty and property are not to be lightly swept away by governmental ukase.

The Supreme Court of the United States is but voicing the political philosophy of the average American when it says "that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' - essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"

To combine in one body the functions of prosecutor, judge, and jury alike is so repugnant to American notions of fair play that the Court seizes upon the opportunity to condemn such practice in no uncertain terms. "****What would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an ex parte discussion without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect.

"As the hearing was fatally defective, the order of the Secretary was invalid."

Under normal circumstances such a decision would create little interest and beyond the immediate parties to the proceeding would be relatively unimportant, but in the light of current history it assumes an added significance. The Democratic process is everywhere on the defensive; no longer is it a self-evident truth "that all men are created equal, that they are endowed by their Creator, with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness." In deciding the Morgan case the Supreme Court did more than decide an issue between the Government and a private individual; it reaffirmed and let the weight of its authority and dignity to the American philosophy that tolerance, due consideration for the rights of others, and above all, fair play, are more than mere abstractions; they are a way of life - the American way.

H.R.E.

* * * *

LOFT, INC. v. GUTH.- Suit was brought by the Loft, Inc., against Charles G. Guth and others to impress a trust in favor of the complainant upon all shares of stock of the Pepsi-Cola Co. registered in the name of defendant, Charles G. Guth, and in the name of the defendant Grace Company, Inc. of Delaware, to secure a transfer of those shares to the complainant, and for an accounting.

"Briefly described the gravamen of the bill is that Guth as director and President of complainant caused a certain very de-

sirable business proposition which was made to him as President of the complainant, to be diverted from the complainant to a newly-formed corporation, the defendant Pepsi-Cola Company, most of the shares of the capital stock of which he and his personal holding corporation, the defendant, Grace Company, acquired.

"He caused the complainant's laboratories and the other facilities to be used, the time of its employees to be spent in the manufacture of Pepsi-Cola Syrup, its credit to be employed in the purchase of materials and ingredients entered into the finished product and its many stores to sell and advertise Pepsi-Cola in place of the established soft drink known as Coca Cola, thereby measurably popularizing the new beverage."

Whether the offer was made to Guth personally or otherwise is immaterial. He used Loft's credit, Loft's facilities, and gave it a character of a Loft's undertaking. "In such a case he would be estopped to deny what his acts demonstrated."

Some of the directors knew of Guth's interest in the new corporation, but there was no evidence that they consented to his acts. Even if they had, they could not ratify such fraudulent acts. Guth could not use the corporate property for his own benefit.

The fact that Guth repaid does not discharge him from liability Payment was from the profits that were equitably the profits of Loft's.

To justify the holding that the profits belong to Loft, the Court held "Directors of a corporation stand in a fiduciary relation to the corporation and its stockholders. A director will be held as trustee for the corporation he has undertaken to represent and must account for the profits resulting from an unlawful act done to promote his own interest because he cannot derive any personal benefit or advantage by reason of his position distinct from other stockholders. He must account not alone for the bare value of the beneficiary's property which he took and utilized as his own but also for all the gains and profits which he has derived therefrom."

"It is not necessary that Loft's suffer a loss since the recovery is not for loss suffered but for individual gains acquired. A fiduciary who profits at the expense of his trust cannot justify his breach of duty by saying that his beneficiary did not suffer an out-of-pocket loss."

R. R.

* * * *

IN RE VERSER-CLAY CO.- Proceedings were brought by the Securities and Exchange Commission against Verser-Clay Company and Mid Continental Crude Oil Purchasing Company to ascertain whether the companies had violated or were about to violate provisions of the Securities Acts of 1933. E. C. Clay, President of both Companies,

was ordered to appear before the examiner of the Commission and to produce books, papers, records, et cetera, deemed relevant and material to the inquiry.

Mr. Clay appeared before the examiner at the time and place stated in the subpoenas, but he did not produce the records called for. The hearing was adjourned and subsequently an order to show cause why the books should not be produced was entered. In the final hearing of the controversy before the District Court, the court ordered that E. C. Clay produce the records. It did not require E. C. Clay to give testimony.

On appeal Mr. Clay relies on the fth Article of Amendment to the United States Constitution; U.S.C.A. Const.Amend.5: "No person shall be compelled in any criminal case to be a witness against himself.

Mr. Clay has been indicted for criminal offenses described in said Sections 5 and 17 of the Securities Acts. He claims the object of this proceeding is to obtain proof of his guilt, and that the production of the books would disclose incriminating facts.

The Court denied a rehearing and held "that Clay cannot claim the constitutional privilege for acts of the corporation. It is not claimed that when he was on the stand any question was asked the answer to which would tend to incriminate him. The privilege asserted by him does not extend to the two corporations. It may be true that there is something in the corporate books that shows personal acts of Clay that tend to incriminate him. If so, he had an opportunity to present them to the District Judge and ask that he be protected in his constitutional right but he sought no protection in that respect."

R. R.

* * * *

WALLACE v. HUDSON-DUNCAN & CO, 98 Fed.(2d) 985.- The Agricultural Adjustment Act, so far as it authorizes the placing of quotas on the interstate shipment of agricultural commodities by order of the Secretary of Agriculture, was upheld by the Circuit Court of Appeals last fall in Wallace v. Hudson-Duncan & Co. The order objected to was one imposing on the Company, plaintiff, and all other dealers, an obligation to contribute a percentage of its intended shipments to a Control Board or in lieu thereof certain payments to the Board as a consideration for engaging in interstate commerce in that commodity. Non-compliance with the regulation would require the Company to market the walnuts only in the state in which it acquired them. The purpose of the order was to diminish the supply of walnuts in the consuming markets, with a consequent rise in prices. The Board was empowered to sell the walnuts it received to purchasers abroad or to shellers within the United States, at prices fixed by the Board, or to eliminate all or part of them from the market by donation or sale to chari-

table institutions. The Board also could release the surplus to interstate shipment through the contributing packers. The contributing packers share at the end of the year in the money realized from its sales.

The main question involved was whether the order provided for a taking of property in violation of the Fifth Amendment, or was a deprivation of liberty or property under the same amendment.

Since the order requiring delivery of the surplus to the Board was only conditional and the Company could choose not to comply, and keep its product out of interstate commerce, there was no direct appropriation of property. Even if the Company would suffer a loss by confining its activities to intrastate commerce, this would be an instance of the destruction of property in the exercise of the commerce power. The court cited the Legal Tender Cases, Knox v. Lee, 12 Wall.457, 20 L.Ed. 287, on the clause of the Fifth Amendment which forbids the taking of private property for a public use without just compensation of due process of law. "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals."

It would be possible for such an order to amount to an unlawful taking if a party were given a choice of compliance or selling only within a state where there was no market at all for the product, but that was not the fact in this case.

There was no deprivation of liberty nor property in violation of the Fifth Amendment. The guaranty of due process, it has often been held, demands only that the law shall not be unreasonable, arbitrary, nor capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. The Company has admitted that the order reasonably effectuates the purpose of the Act.

Since the conditional requirement of the delivery of the walnuts to the Board is within the power of Congress and the Secretary, the fact that in attaining price parity, it may be deemed necessary to give some or all the surplus to indigent persons does not make the requirement unlawful. It cannot be said that such a disposition has no reasonable relation to the lawful objective of the Agricultural Adjustment Act. There is sufficient power for such a disposition of the surplus in this case, even though it may be argued that in an attempt to prevent the so-called depressions of abundance referred to in Edwards v. U.S., 91 Fed.(2d) 767, Congress will seek to expand the exercise of a power to give away surplus; that the precedent may lead to far-reaching legislation to distribute to those who need but who do not have, both the surplus of the enormous production given by scientific enlightenment to agriculture and that given by both science and invention to the machine.

The Edwards case stated that Congress, in regulating interstate commerce has a police power for the benefit of the public; that it may be exercised to prevent the economic harm from the

lack of price parity of farm and manufactured products which the Agricultural Adjustment Act aims to ameliorate; and that the power of Congress over interstate commerce is as plenary as that of the State Legislatures in their exercise of powers reserved to the States.

J. R.

* * * *

WORCESTER COUNTY TRUST CO. v. RILEY, 302 U.S.292.- The recent case of Worcester County Trust Co. v. Riley is a swan song of justice. The legal mind has met its master. The huge personal wealth in this country remains trembling in the path of legal theft. Great legal talent has failed to protect it. Double taxation is on a rampage.

The problem to be solved is best illustrated by the startling case of In re Dorrance's Estate, 115 N.J.E. 269, 120 Atl.601. An inheritance tax on the decedent's intangible personal property, which includes bonds, stocks, notes, and bank deposits, is levied at the place of the decedent's domicil at the time of his death. Mr. Dorrance died leaving nearly $115,000,000, most of which was intangible personal property. The Pennsylvania court determined that the decedent was domiciled in Pennsylvania at the time of his death and levied a tax of $17,000,000 upon his estate. The New Jersey court, however, disagreed with the Pennsylvania court on the question of the decedent's domicile, holding that it was still in New Jersey. They therefore also levied a tax on the estate of $17,000,000. It is a legal truth that a man can have but one domicile at one time. Yet two courts can draw different inferences from the same facts and reach opposite conclusions as to where one is really domiciled. Those words are a poor substitute for $17,000,000 when the executor must face the legatees.

The Riley case was an attempt to interplead the tax officers of the two States which claimed the domicile of the decedent, allowing them to solve the problem between themselves in the Federal courts. The Federal courts refused to entertain the case as it contravened the Eleventh Amendment to the Federal Constitution, being, in effect, a suit against a State without its consent

This is sound law. Yet something should be done to prevent this gross injustice. The law itself is on trial. The finger of tyranny is pointing with pride.

The best practical advice to give to a client is to establish one definite domicile in one place by cutting away all ties with states which perhaps could claim the domicile. Sell the summer home in the country and the winter home in the south. Vote at your intended domicile and declare it to be so. Remove all doubt in the matter. Then and only then can you be sure that your last living act on earth will not render your family destitute.

R. F. C.

* * * *

FULL FAITH AND CREDIT UNDER FEDERAL CONSTITUTION.- The rule has long been followed that the courts of one state may inquire, without violation of the full faith and credit clause of the United States Constitution (Article 4 §1), into the question of the jurisdiction of another state in a particular action. This rule was laid down in Thompson v. Whitman, 18 Wall. 457, where the court said, "We think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the averments contained in the record of the judgment itself." This conclusion was predicated on dictum of Chief Justice Marshall, in Rose v. Himely, 4 Cranch 241. The rule is just. No court can, by ipse dixit, acquire jurisdiction which it does not in fact have.

A long line of authority sustains the position. Notable among the cases is Andrews v. Andrews, 188 U.S.15. In that case, a husband, married and resident in Massachusetts, went to South Dakota and obtained a divorce. His wife submitted to the jurisdiction of the court. The husband returned to Massachusetts where he married again, and later died. The first wife seeks administration. The Supreme Court held that the Massachusetts courts could inquire whether South Dakota in fact had jurisdiction to give the divorce, and that it was not unconstitutional to refuse full faith and credit when it appeared that neither the husband nor wife was ever domiciled in South Dakota, and that the husband went there solely in order to get a divorce.

In the recent case of Davis v. Davis, 59 Supreme Court Reporter 3, the husband and wife were married in Washington, D.C., and lived there. Later, the husband brought an action for separation, in which he was successful. Later, he moved to Virginia, established a domicile, and later sued for absolute divorce, which was granted. The Washington Court, in an action by the husband to modify the alimony provisions in the separation action, refused to give him relief, and the Court of Appeals upheld this, saying that the court did not need to give full faith and credit to the Virginia decree.

In a somewhat obscure opinion, Justice Butler gave the opinion of the Supreme Court of the United States, and said that the Washington court was bound to give full faith and credit to the determination of the Virginia court. The ground for so holding seems to be that the question of jurisdiction and comicile was specifically raised and litigated in the Virginia action. The wife appeared specially and raised the question of whether the husband had standing to sue. This necessarily raised the question of his domicile, since, unless he was domiciled in Virginia, the Virginia court could not give a divorce valid elsewhere.

The case is complicated by various statements which may be interpreted as conveying an implication that there is some other basis for the holding. One statement seems to imply that the Supreme Court had inquired into the facts relied on to establish

the husband's domicile in Virginia. Generally, however, the Supreme Court will not inquire into the facts of a particular case and decide as to their weight.

There are also gratuitous remarks about the wife's misconduct as bearing on the question of jurisdiction - fault as a jurisdictional fact - which rule has been advocated by Professor Beale. There is, however, insufficient expression to justify a belief that the court has or has not adopted this theory.

An attempt to change the wife's purported special appearance into a general appearance is also made in the opinion. There seems to be little reason for this, for regardless of whether the appearance was special or general, the fact of domicile must be decided before a valid divorce can be given, since it is an universal rule that jurisdiction to give a valid divorce decree cannot be given by consent.

Interpreting the decision as deciding that the question of jurisdiction, once specifically litigated, cannot thereafter be raised to prevent giving a judgment full faith and credit, is thus the most logical conclusion. This makes a rather important limitation on the Andrews case, and on all cases ruling that jurisdiction may always be questioned. Certainly no one can quarrel with such a limitation. Once jurisdiction has been specifically -not incidentally- raised and litigated, it should be res ajudicata for all purposes, in all courts, in the absence of fraud. While such a rule is not without authority (Baldwin v. Business Men's Ass'n, 283 U.S.522 - jurisdiction in personam, - contra, Bank of Jasper v. First Nat'l Bank at Rome, 258 U.S..112, - Jurisdiction in rem) this case will greatly strengthen an eminently fair rule.

R. B. C.

LAW REVIEW BOARD

H. Gordon Turner, Editor-in-Chief

Associate Editors

Emil Stanislaus Bartle
R. Burdell Bixby
Richard Bell Congdon
Russell Frank Crego
Arthur Ansty Darrigrand
Hugh Ross Elwyn
Clarence Henry Girard
George Burt Grow
Wilford Arnold LeForestier
Harvey Mervin Lifset
James Westcott Moore
Harry Robert Rosenblum
John Ross
Joseph Serino

TABLE OF CONTENTS

ARTICLES

The State as a Party-Litigant..... 74

New York Rule on Affirmative Covenants..... 83

Trademarks: Unfair Competition..... 90

Law in the Making..... 97

CURRENT DECISIONS

Saluting the American Flag v. Religion..... 107

NOTES

Ollendorff Watch Co. v. Pink..... 110

People v. Shearer..... 111

Equal Protection for the Negro..... 111

THE STATE AS A PARTY-LITIGANT

The status of the sovereign as a party-litigant, often an interesting subject not only from a legal but also from an historic viewpoint, is open to timely examination; this especially in the light of certain rather recent events. It is quite well known that the State may sue in its own courts and also in the courts of other sovereignties. The State as a party-plaintiff presents comparatively few problems; save perhaps the inability of the court to grant an affirmative judgment against the State because of a counte claim. On the other hand and somewhat akin to the counterclaim principle, it is when an individual seeks to sue the State, that a problem replete with pitfalls, figuratively rears its head.

Probably the most facile method of examining this field of inquiry is to look at present-day theory of the status of that remarkable defendant, the State. The State being sovereign, it canno be sued by its citizens without its consent. This cloak of immunit has a two-fold effect: the State is immune from all suits and is immune from actual liability in many instances. No matter the justice of your claim or the validity of your cause of action, you cannot enforce it. It has been said that in claims against the State a statute of limitations exists, the bar of which begins immediately upon the accrual of the claim. Thereafter the cause of action may remain but there is no remedy to enforce it. Such is the situation as to contract claims. Although no state can impair the obligation of contracts and although the State is liable on its contracts, no suit is forthcoming. Therein lies one part of the sovereign immunity of the State. On the other hand, no such proposition holds true as to the liability of the State for the torts of its agents. Whatever wrong is attempted in the name of the State is imputable to its government and not the the State, for as it can speak and act only by law, whatever it does say and do must be lawful. (Litchfield v. Bond, 186 N.Y.66; Pindexter v. Greenhow, 114 U.S.270). Hence the State is also immune from liability for its torts. So, in obtaining consent of the State to be sued for a tort you must secure not only a waiver of the immunity from suit, which exists in all instances, but also you must have the State admit its liability. From the above we see the American common law status of the State as a party-defendant.

The roots of the immunity of the State from suit grow deep indeed. Centuries back sovereign nations were composed of a king and subjects. By far, the former was the important part of the sovereignty. Each nation had an individual head; the very personifica tion of abstract infallibility. There were laws and courts and judges, each having a nation-wide sway; but there were also kings. Because of this virtually "untouchable" characteristic of the king the courts did not venture nor didthey dare to venture to subject to their jurisdiction that very august individual, the King. Actually the courts grew up side by side with the king, juristically speaking, until there existed not only the law of the courts but

also the law of the king. This so-called law of the king later developed into the foundations of equity as we know it today. So, starting with the inviolate character of the king's person and the court's reluctance to question it, there grew the universal tradition that "the king could do no wrong." Hence the early name of chancery proceedings, "an appeal to the conscience of the king."

This well recognized immunity of the king, and incidentally his servants acting under his orders, was altogether necessary while the personal-sovereign concept of government existed. Due to the fact that the monarchy was the form of the government of Great Britain in the late Eighteenth Century, our own jurisprudence naturally partook of this doctrine of sovereign immunity, even though we had no such thing as a king or a personal ruler. So generally recognize was this immunity that it was universally held to be an essential attribute of any sovereign entity. Therefore, not only our national government but also each one of our states from its very inception, became clothed in the raiments of immunity.

With this starting point of accrued immunity, there has been a gradual, yet a constant metamorphosis in the concept of immunity of the State from judicial suasion. In the beginning the State being sovereign was not amenable to private claims against it on the part of its people, except with its consent. This immunity is not a simple one partially due to these historic causes and partially to our own peculiar system of government. The American government is based on several broad doctrines, not the least important of which is the separation of powers. Under such a system it would be self-contradictory, so it has been claimed, to allow the judicial branch to lay claim to the authority to control the branches by passing judgment on their actions and assessing liability thereon. (Parenthetically, Mr. Chief Justice Marshall in Marbury v. Madison saw no contradiction in laying the foundation for the court to pass on the constitutionality of the acts of the Legislature). Thus went the theory of the separation of the powers of our government.

In other words, both monarchy and democracy left their marks upon our concept of sovereignty and its attendant immunity. (U.S. v. Lee, 106 U.S.196, dissent). As has been said "The conscience of the sovereign was the only guarantee enjoyed by the individual in his relations with the nation." (Federalist No. 81).

Such an indefinite state of affairs certainly had no sound basis for continuing as a part of our governmental philosophy. But even so the State reluctantly, and only by degrees, surrendered its protection. Indeed, as soon as the courts endeavored to depart from the time-worn theory, the people were overprompt to check any inroad on the old doctrine. When the United States Supreme Court, in Chisholm v. Georgia, decided that the Federal Courts had jurisdiction to try a case brought by a citizen of South Carolina against the Sovereign State Georgia, a wave of protest arose that resulted in the passage of the Eleventh Amendment to the Federal Constitution. (Chisholm v. Georgia, 2 Dall.420). This Amendment prevented any State from being sued by a citizen of another State and, by judicial interpretation, of the same State. (U.S.Constitution 11th Amend.; Hans v. Louisiana, 134 U.S.11.) Hence the thought that American

jurisprudence might encompass a new concept of sovereignty was checkmated for the time being and the sentiments of Judge Iredell, the only dissenting Justice in the above case, in effect remained the law of the land.

Parallel to the Federal situation, the State of New York partook of the same philosophy. It was up until the time of the construction of the Erie Canal that a rather medieval procedure existed in the prosecution of claims against the State. Prior to this time, each claim was the occasion of separate legislative action. The claimant obtained through a "one man lobby" the passage of a special enabling act; a sort of legislative waiver of immunity combined with a permissive audit or an appropriation. With the appropriation of land for the canal, the number of claims against the State began to increase and to multiply. As can well be imagined this practice of legislative appropriation became the subject of such abuse, that a Constitutional Amendment was passed prohibiting the Legislature from auditing or allowing any private claim against the State (Art.3 §19) This made it necessary to set up other means for auditing private claims. As a result a Board of Audit was set up in 1876 (Laws 1876 Chapter 442; Quale v. State, 192 N.Y.47). From this beginning emerged the present day Court of Claims Act, which provides for a judicial body devoted to hearing and deciding almost every conceivable kind of claim against the State. New York State, then, recognized the fact that there would be many, many just claims against th State as it increased the scope of its activities. To deal with these the Court of Claims was set up.

In endowing this Court with the jurisdiction the Legislature sought to provide an easy and direct manner of determining the claim that might be presented for land appropriations, contract actions, death claims, etc. The success with which this effort was crowned is exemplified by the leading case dealing with the limitations of the jurisdiction of the Court of Claims as set forth in §12 of the Court of Claims Act. In Smith v. State, 227 N.Y.405, the claimant tripped over a wire which was strung up on the State Reservation at Niagara. Claiming the negligence of the State's agents to be the cause of his injury, he attempted to sue the State without first obtaining an enabling act. He claimed that §12 of the Court of Claims Act was a blanket enabling act entitling him to so pursue his remedy. The court said: "The State is not liable for injuries arising from the negligence of its officers unless such liability has been assumed by Constitutional or Legislative enactment. The exemption of the State from liability for torts does not depend upon its immunity from action without its consent, but rests on grounds o public policy that no obligation arises therefrom. Section 12 merel declared the jurisdiction of the Court of Claims rather than enlarging the liability of the State. A mere waiver of immunity from action. Immunity from liability is another thing entirely." (Smith v. State, supra). Hence, in the absence of a special enabling act assuming liability for his injury, the claimant was precluded from suing the State.

Section 12 of the Court of Claims Act then operated as a waiver of immunity from suit. Within the jurisdiction of the Court under §12 came two classes of claims: those upon which the State was liable although formerly protected by immunity from suit; and those for which a special enabling act had been issued admitting the

State's liability thereon. This summary of the jurisdiction of the Court of Claims of New York State has equal application to the juris diction of the Court of Claims of the United States.

As was said in Smith v. State, supra, this waiver of immunity from suit did nothing to alleviate the ancient immunity of the State from liability for the torts of its agents. With the advent of the modern concept of the suability of the State a serious question presented itself. Was the old idea of immunity from liability a feasible one in the light of the new policy? Most of the answers forthcoming were to the effect that, should the State be held liable for torts, a great mass of claims would be presented. The State was too big and too widespread to be held accountable for the errors of its many hands. The myriad State activities necessarily involved many mishaps and since the State's agents were only human, those mishaps could not be avoided. Hence it would be in effect a retarding influence on State activity to allow suits on tort claims. But an opposite contention, perhaps found on better and more practical reasoning was also presented. This school of thought, instead of devoting itself to theoretical considerations and suppositions, looked around at existing conditions and reasoned by analogy. The State was a great legal entity. So also was the modern interstate corporation. The State was inevitably state-wide. The corporation was often nation-wide. The corporation enjoyed no immunity from liability yet it suffered no concomitant retardation due to the results of its liability. So why should the State so suffer if the doctrine of immunity from liability be abolished?

Looking for justification for their reasoning in the actual field of government, the proponents of this position pointed to France, another great modern democracy. The French citizen is doubly safeguarded against the acts of the Administration; he may institute an action to have such acts annulled; after their promulgation, or if the executed act injures him, he has his action against the State. As to the latter remedy, the State is liable for the torts of its agents when the State is performing acts of private gestion, viz, engaging in ordinary business or operating industrial monopolies. But the concept of the citizen suing the State in France is not limited to such operations. France has gradually adopted the theory of the liability of the principal for the torts of its agents where a fault arises in the rendering of public services; as the theorists call it, the doctrine of insurance against the social risk. Thus in France, tort actions against the administration are not mere matters of legislative whimsy. Rather they are an ordinary protection guaranteed by the substantive law for the benefit of a citizen who is unlucky enough to choose a government employee for his tortfeasor. The results of such a doctrine have not been spectacular. The French Government bears no great burden. Instead it exemplifies the modern practical trend of State responsibility.

Hence there appeared no good reason for our own rule about the immunity of the State from liability for torts. Indeed the entire subject could be resolved into one query: When would the State recognize the new philosophy?

Not so long after the Smith case, supra, the Legislature passed

a statute that reiterated and codified this modern policy into a declaration. (Court of Claims Act §12-a as added by Laws of 1929, Chap.467, in effect Sept.1,1929). This section provided in effect as follows: "The State hereby waives its immunity from liability for such torts determined in accordance with the same rules of law as apply to an action in the Supreme Court against an individual or a corporation and the State hereby assumes liability for such acts and jurisdiction is conferred on the Court of Claims to hear and determine all claims against the State to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employee..... Nothing herein contained be construed so as to effect or repeal any provision of the Workmen's Compensation Law."

Let us see just what that statute has accomplished as declared by the Court of Appeals. By far the leading case on the subject is Jackson v. State, 261 N.Y.134. The facts of that case are these: Pursuant to the Highway Law, the State Superintendent of Public Work condemned a certain bridge as being unsafe for travel in vehicles weighing over four and one-half tons and traveling more than ten miles an hour. The claimant, driving a vehicle of a weight and a speed within the stated limits, passed over this bridge and it collapsed, injuring the claimant. Neither §19-a nor §176 of the Highway Law confers on a person injured the right to enforce the claim. Hence the claimant had to "hang his hat" on the newly-enacted §12-a of the Court of Claims Act. The Court, after stating the above, proceeded to construe in concise language the effect of the statute. "Section 12-a goes beyond the point of mere waiver or immunity from suit. It waives immunity not only from suit but also from liability ....By §12 the defense of sovereignty in an action was removed. Suit was allowed but liability was held not to have been waived. By §12-a liability when proved by the rules of law applicable to individuals has been affirmatively assumed and jurisdiction to determine whether such a liability has been proved is conferred on the Court of Claims. In assumption of liability and the creation of a remedy to enforce a liability, heretofore absent by reason of the sovereignty of the tortfeasor, the sovereign has not generously dispensed charity. Section 12-a constitutes a recognition and acknowledgment of moral duty demanded by principles of equity and justice....It transforms an unenforceable moral obligation into an actionable legal right and applies to the State the rule 'respondea superior.'" "The State thus provides for four things which shall result from the infliction of personal injuries due to the negligence of its officers and employees while acting as such officers and employees. It waives immunity from liability, it consents to have its liability determined in accordance with the rules of law applicable to individuals, it assumes liability and it confers jurisdiction on the Court of Claims of liability." (Jackson v. State,261 N.Y.134.)

Thus it appears that the necessity of an enabling act is obviated. The prior obstacle of immunity from liability has been eliminated and no longer will the claimant be obliged to resort to the Legislature for a specific waiver. Since the Jackson case, clear as it was, there have arisen innumerable situations that have required judicial construction and that have even gone as far as the Court of Appeals. Some of these situations are of importance,

others merely amusing (from the legal viewpoint). But in order to marshall the salient features of our Legislature's recognition of a modern conception of sovereignty it is perhaps necessary to view briefly and without extensive comment the several problems that arise from the situation as it now stands.

In certain cases it has been held that an enabling act is necessary to allow a recovery by the claimant. These situations calling for an enabling act bring into play the Constitutional restrictions imposed on the Legislature in reference to special acts. "Neither credit nor money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking." (N.Y.Con. Art.VIII §9; Ausable Chasm Co. v. State, 266 N.Y.326.) The Ausable Chasm Co. case states rather clearly the judicial interpretation of the Constitutional limitation, even though the case is not one sounding in tort. There the claimant, acting under no necessity but purely for his own benefit, constructed a bridge and thereby linked the two unfinished ends of the highway. The Legislature by a special statute authorized the hearing of the claim for the cost of building this bridge and hence completing the highway. In commenting on the power of the Legislature in such a case, the court said, in effect: "Article VIII §9 does not prohibit the recog nition of claims which have their roots in equity and justice." (Citing Oswego Syracuse R.R. v. State, 266 N.Y.351). "But here a purely voluntary benefit was conferred..... The Claimant can earn the gratitude of the State but there arises no moral obligation." (Ausable Chasm Co. v. State, abridged).

The applicability of that rule of limitation and its non-applicability to somewhat similar situations, is exemplified by the cases of Cuvillier v. State, 132 Misc.182, af'd 250 N.Y.258, and of Farrington v. State, 248 N.Y.112. In the Cuvillier case, the claimant, suing under a special enabling act, made claim for legal expenses incurred in the defence of a charge of criminal libel while he was a member of the Assembly. There had been no determination whether the libel was committed or not for the case was dismissed because of lack of jurisdiction in City Court. Certainly there was no proof that a State employee libeled him. The court pointed to the decision in Matter of Chapman v. City of New York, 168 N.Y.80, wherein a statute providing for a bond issue to defray the expenses of defending unsuccessful suits for removal of a county officer fro office was declared unconstitutional because of the lack of a legal moral or equitable obligation on the part of the State. This decision, the court maintained would be sufficient answer to the claimant's suit since he too showed no legal nor moral obligation on the part of the State for the liability attempted to be created by an enabling act. In the Farrington case, however, a different result was reached, and perhaps a sound distinction can be discovered. In that case the claimant was one of several detective agents in the State Comptroller's office. Owing to a cut in the ap propriation for civil service jobs, claimant was dismissed. At the time the Civil Service Law provided that when a position was abolis ed the suspension of the incumbents should be in the inverse order of their appointments. Claimant was not dismissed in such order. He was forced to obtain mandamus in order to effect his reinstatement, the cost of which was to himself one thousand dollars. The Legislature passed an enabling act conferring jurisdiction on the Court of Claims to hear his claim for the expenses. The court bega

by reiterating the Constitutional limitation on "gifts" by the Legislature. It then said that "only when the principle of liability to be enforced is extra-legal is a special enactment requisite to establish it as a principle of recovery." (Farrington v. State, supra)

Then the court mentioned the usual situations where enabling acts are held constitutional, viz, where a benefit is conferred on the State, or damages are caused by the State or those for whom the State is justly liable. The court went on to say that "However, the Legislature may not, under cloak of recognizing and satisfying a debt of honor, in fact bestow a charity. Preliminarily, therefore, in the case of every enactment sanctioning the allowance of a private claim, there arises a question of legislative power which must be determined by the courts. It must appear to the judicial mind and conscience that the particular claim belongs to a class concerning which the Legislature, in the exercise of a wide discretion, might reasonably say that they are founded in equity and justice and involve a moral obligation on the part of the State which it should satisfy." The court then held that there was such an obligation here, due to the provisions by law as to the order of suspension.

Another problem that arose in reference to the application of §12-a was the reconciliation of the broad assumption of liability in the above section with the limited nature of the State's liability in other statutes. Two recent examples of this conflict of statutes and of various courts' treatment of it are contained in the following cases: Miller v. State, 231 A.D.363; Hinds v. State, 144 Misc.464 Goldstein v. State, 161 Misc.357, rev'd 256 A.D.141.

As background for the Miller case, a quotation from §176 of the Highway Law will suffice: "The State shall not be liable for damages suffered by any person from defects in State and county highways, except between the first day of May and the fifteenth day of November on such highways as are maintained by the State under such system as the Commissioner of highways may adopt pursuant to §170, but the liability for such damages shall otherwise remain...." In the Miller case the Appellate Division commented on the above section as it was affected by §12-a of the Court of Claims Act. In effect the case held that §12-a did not repeal §176 but that these sections must be read together; §176 applies to defects solely, and if the injury is caused by the negligence or misfeasance of State officers, the Court held that §12-a amounts to an assumption of liability therefor. Later the Court of Claims in the Hinds case, supra, held that the Miller case was not applicable there, as counsel for the State contended. This holding was based on the factual distinction that the injury in the case under consideration occurred solely for a defect of the highway and was in no way caused by the negligence of State employees. Hence since the "patrol system" period, as set up by the Commissioner, had lapsed at the time of the accident the State was not liable. So, in effect, the court has the tendency to require that the facts upon which a claimant bases his right to recover fit squarely and exactly into the "misfeasance and negligence" phrase of §12-a.

The Goldstein case, supra, presented another phase of the problem of statutory conflict. What effect, if any, would the waiver of immunity have on Workmen's Compensation as applied to State employees? The last sentence of §12-a makes specific reference to

that situation. "Nothing herein contained shall be construed so as to affect, alter or repeal any provision of the Workmen's Compensation Law." (§12-a Court of Claims Act). Hence it may be said that if the claimant is anyone but an employee of the State he may sue. But if he is a State employee he is relegated to his remedy under Compensation. Recently the above mentioned principle came before the court for review. A member of the National Guard, while en route to summer camp in one of the State trucks, was injured due to some overhanging bridge superstructure. The claimant did not obtain an enabling act but sued under §12-a. (Goldstein v. State, 168 Misc 337.) The Court of Claims held that since the claimant was an employee of the State he was confined to either his remedy under the Military Law or under Workmen's Compensation and hence the claim was dismissed. The court did say that if the claimant "had a special enabling act the result would be different." Hence the doctrine that a State employee may not sue under §12-a is further modified to provide that only those who are not State employees may present claims without enabling acts. But when an appeal from that decision was taken, the Appellate Division reversed the Court of Claims and reinstated the claim (Goldstein v. State, 256 A.D.141). The basis of that decision was that the claimant was not an employee of the State. From the above one can see the efforts the courts are making to "fit in" the previous statutes with our new statutory declaration of policy.

The cases coming before the court under §12-a have been varied indeed. The State has been held liable for conversion (American Engineering Co. v. State, 152 Misc.528); falling rocks on highways (Shaknis v. State, 251 A.D.767); Negligence of State trooper in failing to transmit cancellation message as to arrest of occupant of certain auto who was afterward killed while resisting arrest by a plainclothesman (Slavin v. State, 249 A.D.72). The State has been held not liable for a pure defect in highway (Hinds v. State, 144 Misc. 464); to a convict, suing while serving his term, for injuries sustained in prison (Green v. State, 251 A.D.108); negligence of officers of State in failing to furnish inhabitants of a municipality protection against loss by fire (Hughes v. State, 252 A.D.263); unavoidable damage done to claimant's house by State trooper arresting a criminal (Mowers v. State, 168 Misc.651).

The above genealogy of the modern Court of Claims presents the main jurisdictional problems that have and will frequently occur with reference to actions against the State. The activities of this Court are growing each year both in number and in variety. Yet its history, scope, and power are not generally known. Even less well known are its rules of procedure, despite the number of cases adjudicated before it. Although these rules are not in substance different from the rules of practice before the Supreme Court, yet they are necessarily unique in certain particulars.

One of the prime requisites of suing the State is first to comply with §15 of the Act by filing notice of intention or notice of claim. In most actions the claim must be filed within 90 days after the accrual thereof unless a notice of intention to file a claim is made within that time, in which event the claim must be filed within 2 years after the accrual of the claim. Prior to a recent amendment of the section, the State could not waive filing within the time limited and if the claimant did not comply therewith he was forced to the necessity of obtaining an enabling act, a much longer proce-

dure. But now the section provides for a proceeding within two years after accrual whereby the claimant may apply for permission to file his claim, alleging a sufficient excuse for non-compliance. The appendix to the Rules of the Court of Claims sets out preferred forms for the above.

The State need not answer, for the allegations in the claim are denied automatically (Rule 2). But if the State makes a counterclaim it is usually in writing, although there is a question as to the necessity of this (Rule 14). Where such a counterclaim is interposed by the State, the claimant cannot discontinue his action except upon a written order of the court (Rule 17). With the mechanical details of the action completed, the court, consisting of three judges will hear the claim. The trials are somewhat informal but after trial and before decision the cases are required to be submitted upon written requests to find and written briefs. One reason for the submission of these papers is that in order to facilitate matters and to accomplish the hearing of many claims, only one judge presides at the session of court. Since a majority of two judges i necessary to reach a decision, the only way in which to allow an absent judge to pass on the claim is by his reading the above papers and the record. Each party may appeal from an order or judgment of the Court to the Appellate Division of the Supreme Court of the Third Department, except that appeals relating to cases which arose in the Fourth Department shall be taken to the Appellate Division o such Fourth Department. Provisions of the Civil Practice Act relating to appeals in the Supreme Court apply except as limited by the Court of Claims Act itself (§§29,30 Court of Claims Act).

From the above life history of the status of the State in its own courts perhaps the reader will glean the salient factors which must be considered in any case involving the sovereign as a defendant. This evolution and its result, long and involved as it seems is in reality capable of brief summation. Originally not amenable to any suit, the State was fully protected and could never be made party-defendant without its consent. Hence a claimant was forced to obtain a special waiver of this immunity from prosecution. If the claim had involved any tort liability, the State, by its very defin tion could not become a tortfeasor. Hence since the State had no liability whatever for a tortious injury, a claimant had perforce to obtain not only a special waiver of immunity from suit but also a special assumption of liability. New York State, recognizing that such a garb of immunity was no longer in keeping with the modern "picture" of the purpose of the State let alone necessary to the proper existence thereof, passed first a blanket waiver of immunity from suit and later a broad assumption of liability. The result of this progressive legislation has been to place the State of New Yor a great legal entity, in the same status in reference to liability and suit as the modern corporation, likewise a legal entity. Revol tionary the result may seem, in the light of past notions, but hardly disastrous.

The Court of Claims Act might well be characterized as a declaration by the Legislature that out State policy will no longer preclude the citizen from obtaining indemnity and redress for injuries caused by the wrongdoing of an entity which derives its very power from the victim.

NEW YORK RULE ON AFFIRMATIVE COVENANTS

Covenants are divided into two major classes: real and personal. Real covenants are those which run with the land and bind not only the heirs and personal representatives of the covenantor, but his assignees as well. Personal covenants pass no such right to the vendees or assignee of the property sold but bind only the covenantor personally, or in certain cases, those who take lands which are subject to restrictive covenants with notice thereof. The discussion here assumes to deal with real covenants alone and then only in a single particular phase, that is, so-called affirmative real covenants which impose an affirmative duty upon the grantee of the land. It is further limited for reasons which will be stated later, to covenants in transfers of fee estates only.

New York State is alone in making the distinction between affirmative covenants and negative or restrictive covenants as regards their running with the land. The courts of other states merely inquire whether or not the covenant is one that may run wit the land and if it meets the necessary requirements, then it is enforceable. They do not stop to consider where the burden falls. In general if the covenant touches or concerns the land and if there is privity of estate between the parties, the covenant is enforceable.

Our New York courts, however, treat affirmative covenants as constituting a separate problem. It was in the leading case of Miller v. Clary, 210 N.Y.127, that the New York rule was expressly stated. Briefly the facts in that case are as follows: Prior to 1872 the Phoenix Mills owned a parcel of land east of its mill. In that year it divided that land into four plots and sold them separately, each deed covenanting that the grantor should supply sufficient power from its wheel in the mill to turn a shaft and machinery on the land conveyed. The covenant read that the grantor should keep the wheel in good repair and "construct and maintain said shaft to the west line of said lot." The defendant has secured the mill property, while the plaintiff is still the owner of all four lots east of the mill. This action was commenced in order to secure a construction of the covenants in deeds and to compel the defendant to furnish power to the plaintiff at the defendant's expense.

J. Cuddeback there writing for the court said, "The covenant to construct and maintain the shaft is known in the law as an affirmative or positive covenant. It compels the covenantor to submit, not merely to some restriction in the use of his property but compels him to do an act thereon for the benefit of the owner of the dominant estate."

"It is the established rule in England that such a covenant does not run with the land and cannot be enforced against a subsequent owner of the servient estate, either at law or in equity. Some of the courts of this country have taken a different view.... ...On the other hand, it has been held in this State that certain

positive covenants, which are mainly in line with the covenants excepted by the English courts from the rule adopted there, do run with the land - as covenants to build fences along boundary lines, covenants relating to party walls, covenants to provide railway crossings and covenants in leases to pay rent or repair buildings on the demised premises."

However much the Miller case may be criticized, it stands forth in this State as expressing the New York law on the subject of affirmative covenants. It is not possible, however, to stop here, for to under stand the rule, cases dealing with the above exceptions need be studied. The last of the above exceptions will not be treated here. The reason for the omission is the fact that the question of running covenants is not very deeply involved therein. Leasehold interests, strictly speaking, are not concerne so much with privity of estate as with privity of contract. It was said in the recent Pennsylvania case of Goldberg v. Nicola, 178 Atl. 809, that the authorities have recognized the distinction between real covenants in landlord and tenant relations and real covenants that are restrictive covenants running with the land and contained in the deed. The contractual aspect of a covenant in a lease, as, for instance, to pay rent, is never lost sight of; although it runs with the land, the original covenantor is liable even if he has assigned the lease. In covenants entered into by the grantor and grantee of a fee, on the other hand, the property aspect predominates, the contractual liability ceasing with the ownership of the land.

It will be noticed in the cases to follow concerning the othe exceptions that there is a strong beneficial aspect involved. That is, the burden of affirmatively performing the covenant is offset by a benefit flowing to the covenantor's land as well as to that of the covenantee.

The case of Satterly v. Erie Railway Co., 113 A.D.462, concerns a covenant to build and maintain a boundary fence. The action was brought to recover damages for loss of cattle which strayed from plaintiff's land upon the defendant's right of way. Plaintiff here acquired title to his land under one Denniston from whom defendant also held title. In defendant's deed Denniston covenanted and agreed to build and maintain a good and substantial fence along each side of the right of way, and at all times to keep the fence in good repair. Neither the plaintiff nor his grantor ever constructed such a fence. Court there held for the defendant stating that the covenant ran with the land and plaintiff's failure to maintain the fence precluded his recovery.

A similar case is that of Dey v. Prentice, 90 Hun 27. There the plaintiff sought to recover for the cost of a line fence which he claimed the defendant should have paid in part. The defendant introduced a deed to show that one Beaver, who formerly owned the lands of both parties, deeded the plaintiff's portion to one Luckey by a deed containing covenant. "And the said Luckey is to build or keep in repair all line fences between said lot and the lots adjoining now owned by the grantor." Upon the evidence the court held that the burden was on the plaintiff to show that his lot had been released from the burden so imposed. The covenant

was held to run with the land. In the words of the court, "It was covenant inserted in the deed for the benefit of the grantor as owner of the adjoining land not conveyed, and which is now owned by the defendant."

Day v. N.Y.C.R.R.Co., 31 Barb. 548 provides an illustration of railway crossings as an exception. There an agreement was made between the plaintiff and the defendant by which the former was to convey to the latter a strip of land adjoining the railroad. Plaintiff then was to erect upon his own lands cattle yards and pens for stock for shipping and transferring the cattle to and from the cars etc. In consideration of this the defendant agreed to construct a railroad track on its own land, alongside the plaintiff's land and to deliver to plaintiff all the stock transported eastward. This could not be caued out without connecting the land of the plaintiff with that of the defendant by means of a platform or bridge resting partly upon the land of each. Plaintiff here claims performance on his part. Defendant alleges that the agreement relates to an interest in land and not to be performed within one year and is void because it is parol. In this purpose the court analyzes the agreement. The query is made, "suppose such agreement binding and valid; would it create interest in, or trust or power over or concerning the railroad? It could not be performed without using the railroad and that too for the benefit of the plaintiff's land. Would not such agreement attach to and affect the railroad? Suppose the defendant had sold its road, to any other corporation, could not the plaintiff, if the contract was valid, insist that the vendee should perform it?" Plaintiff claims the contract is personal.

The business could not be conducted without joining these lands so that the cattle could not pass back and forth. Would this not give the plaintiff an interest in defendant's land, and the defendant an interest in the plaintiff's land? "If the contract is valid it in effect created an easement or servitude, which was to be binding upon the real property of the defendant, as servient tenement, for the benefit of the plaintiff and his land, and those who should succeed the plaintiff in his real estate." In this manner the covenant was shown to be one running with the land, although it called for an affirmative act on the plaintiff's part.

The subject of party wall agreements and their enforceability in New York is worth of individual attention for while it is an exception in the New York doctrine of affirmative covenants, it is nevertheless considered differently in other states. One of the earliest cases to discuss an agreement to pay a portion of the cost of erecting a party wall from the viewpoint of running covenants is Savage v. Mason, 3 Cush. 500. It is there said that the agreement "can by no means be considered as merely personal or collateral and detachable from the land.....it has direct and immediate reference to the land....it is beneficial to the owner as owner, and to no other person; it is, in truth, inherent in and attached to the land."

The burden of a covenant to contribute to the repair or rebuilding of an existing party wall runs with the land. Also, the

burden of a covenant runs to contribute to the construction of a party wall to be built by the other party, upon using it, if it merely authorizes either party to construct one in the future. However, when the agreement contemplates a present construction such covenant will not run.

In O'Neill v. Van Tassel, 137 N.Y.297, a former deed contained a covenant stating that the owner should share equally with the adjoining owner the expenses of repairing or rebuilding the existing party wall and that whenever rebuilt to be on the same spot, of same size and materials. Court there held the covenant to run and to bind the owner to the exact terms of the covenant agreement.

The cases on party wall agreements are numerous and often not entirely consistent. It may safely be said, however, that the above general rules are followed in theory if not always in practice. In New York an agreement to presently construct or repair a party wall is considered a personal covenant, although the weight of authority elsewhere holds differently.

From this synopsis of cases illustrating the general doctrine with its exceptions it will be observed that the particular exceptions have one element in common -- that is, that the act called upon to be done confers a benefit on the lands of both parties. In theory, at least, the covenantor is receiving a benefit although he has to perform some affirmative act which he never contracted to do but which was thrust upon him with the conveyance of the land.

A recent trend in the real estate business has led to a more liberal interpretation of the New York doctrine on affirmative covenants. It has become the custom for realty companies to buy up a large tract of land and to create so-called developments. In doing so the realty company as common grantor conveys separate parcels of the land by deeds which provide for certain restrictions on the land and oftentimes for affirmative acts to be done by any grantee. When the original grantee conveys his estate to a stranger the question of running covenants arises.

Levy v. Schurnmacher Const. Corp., 255 N.Y.83, was an action to recover the down payment and expenses upon purchase of a subdivision of a realty development. In November, 1908, the Gem Realty Company owned the section and at that time filed a map dividing it into lots. The tract was triangular in shape and bisected by a driveway. Of the twelve lots some abutted on the driveway and some did not. Covenants in the deed from the Realty Company stated that the abutting owners should bear the expenses of maintaining the driveway and keeping it in repair. One of the abutting owners split his lot and conveyed part to this defendant. No part of defendant's plot now abuts on the driveway. The trial court held that the covenant ran with the land and the Court of Appeals stated, "We assume in favor of the plaintiff that a covenant to repair may be made by apt words and attach itself to the land with the result that the burden of compliance will be charged on successive owners. Such a covenant is a recognized exception to the general rule that covenants running with the land

do not bind to the performance of affirmative acts." The trouble here was that the covenant applied only to abutting owners and this defendant was not an abutting owner.

Greenfarb v. R.S.K.Realty Co., 256 N.Y.130, decided shortly afterwards, concerns a situation where the defendant's predecessor in title had sold another piece of land to others with whom covenants had been made for construction of a road by those others and for a similar construction and maintenance of a road by the grantor through the part retained. The street was laid out through both parcels. This plaintiff has contracted to purchase a part of the retained parcel but claims that it is subject to an incumbrance. The court there said that although a covenant to repair a right of way which runs with the land is not strictly an easement, nevertheless, this covenant relates to and concerns an easement. The covenant here is so incidental and so requisite to the easement that the plaintiff may be deemed to have been fully advised of the covenant. Under the circumstances the plaintiff should have expected that when all the lots of the parcel were sold, it would naturally be the joint duty of all owners to keep the road in repair. Thus it may be said that the purchaser agreeing to buy subject to an easement, contracted to take subject to an "incident" of that incumbrance, viz: a covenant to repair, the imposition of which was obviously called for by the physical situation of the properties.

These two cases and similar contemporaneous cases can be reconciled with the general rule in Miller v. Clary without stretching that rule very far. It is the recent case of Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank (1938), 278 N.Y.248, that has given the general rule one of its latest tests. There the plaintiff, an assignee of Neponsit Realty Company, has brought this action to foreclose a lien upon land which defendant owns. Plaintiff's assignor owned a certain tract of land which it developed as a residential community. A portion of such tract, now owned by defendant, was conveyed to two of its predecessors in title by a deed containing a covenant, which provided that they, their heirs and assigns would pay not to exceed a stated sum each year to the grantor, its successors or assigns, for the maintenance of roads, paths parks, beach, sewers, etc. It was further covenanted that the tax should become a lien upon the land. Plaintiff association was organized to receive the tax and expend it for the benefit of the owners. Plaintiff does not own any of the land. Defendant moved to dismiss the complaint. Judge Lehman wrote the opinion in which it was held that this covenant did run with the land and was enforceable against this defendant. The covenant here is an affirmative covenant to pay money for use in connection with, but not upon, the land which is subject to the burden of the covenant. Nevertheless, the court holds it to be a covenant running with the land. As to its enforceability as an affirmative covenant, Judge Lehman wrote as follows: "It has often been said that a covenant to pay a sum of money is a personal affirmative covenant which usually does not touch or concern the land. Such statements are based upon English decisions which hold in effect that only covenants which compel the covenantor to submit to some restriction on the use of his property, touch or concern the land, and that the burden of a

covenant which requires the covenantor to do an affirmative act, even on his own land, for the benefit of the owner of the 'dominant' estate does not run with his land. In Miller v. Clary the court pointed out that in many jurisdictions of this country the narrow English rule has been criticized and a more liberal and flexible rule has been substituted. In this State the courts have not gone so far. We have not abandoned the historic distinction drawn by the English courts."

The force of this argument is, however, concentrated on the quiry as to whether or not the covenant touches and concerns the land, an element necessary for it to be a running covenant. Only slight attempt was made to bring this covenant within any of the exceptions outlined in the Miller case. The statement was made that there were exceptions to the general rule but that some promises to pay money have been enforced as covenants running with the land against subsequent holders of the land who took with notice of the covenant. Greenfarb v. R.S.L.Realty Co., supra is cited and also Morgan Lake Co. v. N.Y.N.H.& H.R.R.Co., 262 N.Y. 234. In the latter case the covenant was one by which defendant's predecessor agreed to pay for damages to plaintiff's ice crop by cinders and dirt caused by the railroad. Although the decision there was on a point not relevant to this discussion, Judge Crane, despite the difference of opinion entertained by some of his associates, stated that he believed such a covenant, although requiring active performance, should run with the land and bind its succeeding owners.

It is the case of Salvi v. Manning Paper Co., 168 Misc. 661, where the doctrine once more is reviewed by the court. There the plaintiff sought to compel the defendants to maintain and repair a certain dike located on the plaintiff's lands. The court held that the covenant was personal, but that even if it were intended to run with the land that the rule enunciated in Miller v. Clary would prevent it. "The covenant to repair the dike, like the covenant to construct and maintain the shaft as discussed in the Miller case is known in the law as an affirmative or positive covenant."

Here the court states that the Neponsit case did not overrule the judicial policy declared in the Miller case. It places that case as an exception to the general doctrine as allowed by what might be termed the "elastic clause" of the Miller case for further exceptions when Judge Cuddeback stated in that case: "I think that the rule that affirmative covenants accompanying conveyances of land are not enforceable against subsequent owners is a wise one. It has it limits as have been seen, and may require further limitations."

In these later cases may also be seen the element of a benefit resulting to the covenantor or, more strictly, to the land held by him to which the covenant adheres, in return for the burden imposed. Such an element, however, has not been created by the courts as being expressly and definitely necessary for the running of these exceptions. Rather the text writers and judges state that they have always been considered as being covenants capable of running with the land and so judicial cognizance is given to their presence.

In conclusion, the New York rule remains that as set forth in Miller v. Clary with the exceptions therein enumerated. The rule there, however, definitely set forth, lacks clearness, for no one can tell exactly what exceptions exist or will come to exist. The trend seems to be that if the covenant contributes to the beneficial development of the land or if the burden is comparatively slight in comparison to the development of the land to which it is servient, then the court looks favorably upon arguments to uphold them. Studied from this viewpoint the New York rule overcomes its initial impression of being strict. For its uncertainty the rule may be criticized. For its distinguishing affirmative covenants from restrictive covenants it may be praised or criticized, depending upon what the individual thinks the effect of the distinction to be. It may be argued that such covenants are beneficial to realty and aid its transferability, while the converse may also be contended. New York sees affirmative covenants generally as imposing burdens upon realty development and realty transfers. Other states hold that all covenants, affirmative or negative, aid realty in improvements and do not hamper their sale. It may be that future cases, especially involving the numerous real estate developments will lead to a restatement of the rule in a more definite fashion. Until then, any case not falling directly within the Miller v. Clary doctrine must stand upon its own facts.

ARTHUR ANSTY DARRIGRAND.

TRADEMARKS: UNFAIR COMPETITION

Historically the origin of the protection of trademarks by the courts was founded on the theory that such protection was the exercise of a police measure or power to prevent the deceit of the people by sale of defective goods. The repression of trademark infringement came into the common law through an action of deceit, although it is the public, not the plaintiff, who is deceived. Equity acting "in aid of and ancillary to" what it deemed to be a "legal right" to have a particular trademark, at first assumed jurisdiction to protect the plaintiff's title to trademarks regardless of the question of deceit. (Millington v. Fox, 3 Myl.& C. 338 (1838(per Lord Chancellor Cottenham). This attitude shifted subsequently and in 1842 Lord Langdale in Perry v. Truefit, 6 Beav 66, 73, said "The principle on which both courts of law and equit proceed is . . . a man is not to sell his own goods under the pretence that they are the goods of another man . . ." A general rule concerning the differentiation between trademarks was set out in Popham v. Cole, (1876) 66 N.Y.69. "Two trademarks are substantially the same in legal contemplation if the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives and to cause him to purchase the one supposing it to be the other."

Trademarks, as such, have been protected, historically, for the mutual benefit of the producer and the consumer. The trademarks allow the producer to enjoy not only the goodwill his product has created, but also repeat sales. The public is to be protected to the extent that they should not be misled and confused by similar marks on a different producer's output. The common law theory was that a trademark indicated the maker or origin of the product to the customer and that therefore unless the producer could show that his trademark stood for such in the public eye, he had no cause of action. This has been outmoded. The fact that the consumer may be ignorant of the origin or ownership of the product is an insufficient reason for relenting on the enforcement of trademark rights. The consumer's real interest is in the product itself, its quality and uniformity and if he obtains these facts, the actual origin is immaterial. The purpose of a trademark has come to be assurance to the customer that the product emanates from the same source as others similarly marked. (In the matter of McDowell's application, 43 Rep. Pat. Cas. 313 (1926) The creation and retention of custom rather than the designation of source is the primary purpose of trademarks today.

With increasing trade and commerce, the courts have become more and more liberal in their attitude as to what constitutes sufficient ground for granting relief against what was known in England as "passing off." The modern tendency has been to protect against unfairness. "There is no fetish in the word 'competition.' The invocation of equity rests more vitally upon the unfairness", said Dennison, J., in Vogue Co. v. Thompson Hudson Co., 300 Fed. 509, 512.

In order to keep pace with the changing problems presented, the courts have always desisted from restricting themselves to any set rules or conditions as prerequisites to relief in this type of litigation. "There is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong twenty-five years ago may have become such today." (Learned Hand, J., in Ely-Morris Safe Co. v. Mosler Safe Co., (1925) 7 Fed. (2d) 603, 604).

And again "Forward strides in trademark protection are being attained by appeals to 'good conscience' and 'judicial sensibilities' rather than to strictly legal principles derived from a critical analysis of the real tort involved." (40 H.L.R.813 - The Rational Basis of Trademark Protection).

The present method of relief is an action for injunctive relief and damages. The general procedure is that the plaintiff shows prior use of the name or mark involved and that he has built up a custom or prestige around the trademark and that the defendant is "passing off" his goods as the plaintiff's and is thereby profiting. One of the leading cases in New York is Ball v. Broadway Bazaar, 194 N.Y.429. The plaintiff had conducted an establishment for some years under the name of "Best & Co. Lilliputian Bazaar." The defendant opened a similar business under the name "Broadway Bazaar, Brooklyn's Best Lilliputian Store." The court, in granting the injunction said, per Werner, J., that although "Lilliputian" and "Bazaar" are part of our common speech, their use together or in combination with some other word such as "Best", in this case, constitutes a protectible trademark and the defendant is enjoined from using such combinations. "A tradename relates to a business and its goodwill rather than a vendible commodity. Such unfair conduct as is calculated to deceive the public into believing that the business of the wrongdoer is the business of him whose name, sign or mark is simulated or appropriated constitutes the gist of the action. The defendant's conduct is calculated to deceive the public and induce the belief among customers that the defendant's business is connected with the plaintiff's and that the goods sold by the defendant are manufactured by the plaintiff or sold in connection with the plaintiff's business."

There is one very important limitation observed by the courts This regards the right of an individual to use his own name in his business. The right in the absence of self-restraint to use one's own name for business to the detriment of another using the same or a similar name is restricted only upon proof by the plaintiff of fraud or dishonesty of the defendant, or a duty on the defendant to distinguish. Even registration of the name by the plaintiff is not sufficient per se to bar the defendant's use, but long-continued prior use is of some weight in the plaintiff's favor with regard to the duty of the defendant to distinguish the names. 47 A.L.R.1189. Some of the leading cases with reference to this limitation are Decker v. Decker, 52 How. Prac. 218; Meneely v. Meneely; 62 N.Y.427, Seligman v. Fenton, 286 Pa.372, 133 Atl. 561; and Charles S. Higgins Co. v. Higgins Soap Co., 144 N.Y. 462.

In the Decker case the court said, "A defendant will not be enjoined from the use of his own name as a trademark in an action by a competitor having the same name and engaged in the same business, where it did not appear that the defendant's use of the name was with intent to deceive the public or injure the plaintiff."

In the Meneely case the rule was further declared by the court, after citing the Decker case, as follows: A person cannot make a trademark of his own name and thus debar others, having the same name, from using it in their business. Every man has the absolute right to use his own name in his own business though he may thereby interfere with and injure the business of another bearing the same name, provided he does not resort to any artifice or do any act calculated to produce injury to the other beyond that which results from the similarity of names.

The court called such injury as may result from such acts damnum absque injuria in Seligman v. Fenton, supra. In this case the plaintiff had bought out "Fenton Storage Co." and its attendant goodwill. The defendant maintained "H.M.Fenton Storage." In refusing to grant injunctive relief to the plaintiff the court pointed out that the defendant did not use similar letters or lettering in its advertisements nor on its trucks, that the defendant used different-colored vans, and that the defendant did nothing to imitate the plaintiff nor to mislead the public.

The Higgins case, while it followed the general rule outlined in the other cases, came to a different conclusion on the facts therein presented. The plaintiff corporation was founded by Chas. S. Higgins whose father had started the soap business in 1846. In 1892 the plaintiff was incorporated and Chas. S. Higgins sold his rights, goodwill, trademarks, etc., to it for $81,000 and was retained as president for three years when he was dismissed. He then incorporated the defendant and competed with the plaintiff in the same city. The plaintiff sought to enjoin the defendant's use of its name on the ground that such use was unfair competition to the plaintiff. Admitting that the corporate names were dissimilar, the plaintiff went on to prove that its product was known to the trade as "Higgins Soap" and was labelled as such and had "Higgins" imbedded on each cake. The defendant labelled its wrappers and cakes "Higgins Soap Co., Chas. S. Higgins, President." The court held that while the law protects the right of a man to use his own name in his own business even if such use is injurious to another who has established a prior business of the same kind, using the same name and who has gained a reputation which goes with the name, the courts require that the name shall be honestly used and will permit no artifice nor deceit designed or calculated to mislead the public and palm off the business as that of the person who first established it. As to the fact that a corporation name, not an individual's name, was involved, "The courts interfere in these cases not on the ground that the state may not affix such corporate names as it may elect to the entities it creates but to prevent fraud, actual or constructive." The defendant's acts were apparently in bad faith and intended to deceive the public and to divert the plaintiff's business to it, and therefore the injunction was granted.

Another common practice and tendency devised in an attempt to circumvent the charge of unfair competition is embodied in the defense that the parties are not in such competition that a similarity in names will result in confusion in the minds of the public and in injury to the plaintiff. In Tiffany & Co. v. Tiffany Productions,Inc., 147 Misc.679, af'd 237 A.D.801, the plaintiff corporation, famous jewelers, were suing to enjoin the defendant's use of the name Tiffany in its business of production and distribution of motion pictures. No one with the surname Tiffany ever had been connected with the defendant's corporation. The plaintiff alleged unfair competition as the defendant had capitalized on the plaintiff's prestige by its advertising, to wit: the defendant's identifying symbol was the representation of a diamond in a ring in connection with the name Tiffany; such phrases as "Twenty Gems from Tiffany"; "Tiffany, it's a Gem"; "Tiffany Presents"; "Controlled by Tiffany." The court held, "These and other acts were deliberately intended to obtain and in fact did obtain an unfair advantage for the defendant from the goodwill created by the plaintiff in the name. The purpose of these acts was wrongfully and unfairly to appropriate for the defendant's pecuniary gain the value the plaintiff had created in the plaintiff's own name and the plaintiff's unique business and financial reputation." The defendant was enjoined from the use of the name Tiffany in the unfair manner described.

In Long's Hat Stores Corp. v. Long's clothes, Inc., 224 A.D. 497, the defendant resisted injunctive relief on the ground that its sales of clothing were sufficiently different from the plaintiff's merchandise of hats and haberdashery to prevent injury or confusion. The court said, the plaintiff is entitled to be protected not only from direct competition but also from any injury which might result to it from the deception of the public through the unauthorized use of its trade name or a trade name which would lead the public to believe that it was in some way connected with the plaintiff. In the enjoyment of its tradename the plaintiff is to be protected not only with respect to the merchandise it presently sells, but also with respect to that which the public would believe through the deception practiced by the defendant that the plaintiff was selling.

The case of Forsythe Co. v. Forsythe Shoe Co., 234 A.D,355, embodied practically the same facts in that the plaintiff sold men's apparel and haberdashery, and the defendant started in business selling ladies' shoes, stockings, and accessories. In granting the injunction, Judge Sherman said, "Almost invariably the selection by a defendant for use in his business of a trademark or mark which has theretofore been used and advertised by another is for the purpose of appropriating its value and reaping the benefit of the labor of him, who may have made that name an emblem of quality, or of taste, or a symbol of fair-dealing. Equity does not shirk from interfering to prevent such spoliation. Names other than the plaintiff's there are in plenty which the defendant could have selected."

The general philosophy and trend behind this line of cases was very aptly expressed by Judge Learned Hand (Yale Elec. Corp. v. Robertson, 26 Fed.(2d) 972). He said, "It has of recent years

been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by the court. His mark is his authentic sea; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is injury even though the borrower does not tarnish it, or divert any sales by its use, for a reputation, like a face, is the symbol of its possessor and creator and another can use it only as a mark. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two it is unlawful."

Some examples of cases where the use on non-competing goods was enjoined are: Eastman Kodak Co. v. Kodak Cycle Co., 15 Rep. Pat.Cas. 105, the products being cameras and bicycles; Aunt Jemima Mills v. Rigney & Co., 247 Fed. 407, pancake flour and syrup; Vogue Co. v. Thompson Hudson Co., 300 Fed. 509, fashion magazine and hats Wall v. Rolls Royce of America, 4 Fed (2d) 333, automobiles and radio parts; Beech-Nut Pkg. Co. v. P.Lorillard Co., 7 Fed (2d) 967, food products and cigarettes.

Another line of cases has been decided on the question of whether such competition existed between the parties as to render the use by the defendant of the name, adopted by the plaintiff, unfair even though such name has been arbitrarily selected by the plaintiff - that is, arbitrarily to the extent that it is not the plaintiff's name.

One of the older cases in this field is Taendsticksfabricks Akticbolagol Vulcan v. Myers, 139 N.Y.364. The plaintiff manufactured matches and sold its goods in boxes with a label upon which was printed in red color "The Vulcan" and under this "Damp Proof." The lower part of the label consisted of a picture of a globe upon each side of which was the representation of medals awarded the plaintiff -- "Trade-Mark" and "Paraffin Matches." The defendant sold matches in a box identical in size and appearance, bearing in red colors, "The Vulture," a picture of a vulture, a facsimile of the plaintiff's medals and the other words of the same arrangement. It was held that the defendant's label was an imitation of the plaintiff's trademark sufficiently close to be liable to deceive and the injunction was properly awarded in the lower court.

In Albany Packing Co., Inc. v. Crispo, 227 A.D.591, the defendant was enjoined from using the name "First Prize Meat Market" upon proof by the plaintiff of prior use and extensive advertising of the name "First Prize" on all its meat products.

One should not be misled into believing that relief is always granted to the plaintiff upon proof of any similarity. The courts will protect the defendant's rights unless and until the plaintiff proves the elements considered above. In Corning Glass Works v. Corning Cut Glass Co., 197 N.Y.173, the court came to the conclusion that the plaintiff had failed to sustain the prerequisite proof This was an action to restrain the defendant's use of its name on

the ground of unfair competition and for damages. The plaintiff was engaged in manufacturing glass articles; the defendant in cutting glass. The plaintiff had never entered the glass-cutting field. The only possible competition was in the manufacture of "blanks" furnished to glass-cutters. The evidence showed no confusion existed in the minds of the plaintiff's customers. The referee found these facts and also that the defendant had adopted the name "Corning" because Corning was a glass manufacturing city and the defendant wished to gain the advantage of the reputation enjoyed by that city as such center. The court summarized to the following effect, "that it (plaintiff) claims to be entitled to preventive relief, merely because of a similarity in names, which is liable to create unfair trade by reason of a possible confusion in the minds of those transacting business with either corporation to its (plaintiff's) probable injury." (p177) The court went on to hold that from the facts, the plaintiff is not entitled to an injunction since there was no competition nor rivalry between the parties. The plaintiff had no exclusive right to the use of the name "Corning" especially when the prestige as a center of glass manufacture thereto attached was not due solely to the plaintiff's use of the name. The defendant's use resulted in no confusion, damage, nor loss to the plaintiff. The only confusion here resulted from the similarity of the names, not from the manner of the use.

The case of Eastern Construction Co. v. Eastern Engineering Corp., 246 N.Y.459, was similarly decided. Both parties were engaged in the business of building construction. The plaintiff sued to enjoin the defendant from using Eastern as part of its corporate name. Judge Lehman said, "Some similarity of name exists but joined with a difference so marked that it can hardly be overlooked, especially bo those concerned in matters of such importance as the award of a contract for the construction of a public building. . . . The nature of the business in which the defendant competes with the plaintiff reduces almost to the vanishing point the possibility of deception and damage in this case . . . The defendant competes with the plaintiff in bidding for public works. Reasonable probability of loss of business by the plaintiff which constitutes the ground for the intervention of a court of equity is lacking."

The latest case on the subject in New York, The Stanley Works v. Decorative Cabinet Corp., 279 N.Y.577, is directly in line with the weight of authority. The plaintiff's business included the manufacture of doors and door equipment. It placed a photo-electrically controlled door operating equipment on the market under the name of "Magic Doors." The door is caused to open automatically by air pressure upon the interception of a beam of light. The defendant, engaged in the manufacture of closets and cabinets, produced a fibre closet for clothes storage, equipped with a front flexible door which automatically slid up, in the manner of a curtain, by reason of a spring attachment which operated when pressure was put on a snap which released the closet door and placed the spring in operation. The defendant called its product by the fanciful name of "E-Z-Do Magic Rol-A-Dor." The court found neither unfair competition nor any actionable infringement in the defendant's use of "Magic." There was no competition between the respective products, and the defendant used "Magic" in connection with

other words which distinguished it from the plaintiff's registered tradename.

The most recent case in the United States Supreme Court, Kellogg Co. v. Nat'l Biscuit Co., 83 L.Ed. 93, seems to be out of line with the general trend, but upon closer analysis the differences are easily reconcilable. The plaintiff National Biscuit Company, is suing to enjoin the defendant from producing a pillow-shaped shredded wheat biscuit and from selling the same under the name of "Shredded Wheat." The lower courts granted the injunction. The court here reversed the lower court and dismissed the bill on the following grounds: The Plaintiff had a patent issued on the process of manufacture and the design of the pillow-shaped biscuit in 1895. The court said that since such patent has expired, the process, the shape, and the good-will enjoyed by the plaintiff thereunder are now dedicated to the public and available to anyone desiring to use them. The plaintiff has not attempted to use "Shredded Wheat" as a trademark because an application to register this name under the Act of Feb. 20, 1905, Chap. 592 §5, was denied upon proof in opposition proceedings of former use for the same purpose by another party. Any right to the exclusive use of the name still existing was by virtue of the patents, and these had expired with the patents. There is no evidence of deception or "passing off" by the defendant. The defendant is entitled to use the generic name "Shredded Wheat" and the pillow-shaped biscuit even though the defendant is thereby enabled to obtain a share of the market developed by the plaintiff. The fact that the defendant plainly labels its carton, which is entirely different from the plaintiff's, "Kellogg Shredded Wheat shows that the defendant is profitting only from the now public name "Shredded Wheat" and is not infringing on the plaintiff's tradename, National Biscuit Co.

The value of the modern trademark lies in its selling power. This selling power depends for its psychological hold on the public, not merely on the merit of the goods upon which it is used but equally upon its own uniqueness and singularity. Such uniqueness and singularity is vitiated by its use upon either related or non-related goods. The degree of its protection depends in turn upon the extent to which, through efforts or ingenuity of its owner it is actually unique and different from other marks. (The Rational Basis of Trademark Protection, supra).

HARVEY MERVIN LIFSET

LAW IN THE MAKING

Our comments and observations of the past have generally encompassed variations, extensions or limitations of law emanating from the pen of the judiciary. Our scope broadens in the article which follows. We consider herein some of the changes contemplated by the New York State Legislature of 1939.

At this writing the Legislators have crammed the hoppers with 3,862 pieces of legislation. Much of this potential law affects the practicing attorney, the judge, and the student of law in a most direct manner. To examine any great part of it in the space allotted to us, is an impossibility. We are, therefore, driven to make a selection from the broad field which confronts us.

Our choice brings us to the doctrines which govern the subject of election of remedies. We consider first the election of the "theory" upon which the cause of action is based. In Terry v. Munger, 121 N.Y. 161, the plaintiff charged that certain defendants had detached and carried away machinery and converted it to their own use. In a previous action the plaintiff brought suit against certain defendants to recover for the wrong. The court in that action held that the plaintiff's complaint stated an action "ex contractu" and not "ex delicto" for the wrong done to the plaintiffs by the conversion of their property. A recovery was denied because the defendants had not disposed of the property, the court holding that under such circumstances the fiction of the receipt by defendants of money for the sale of the property which they impliedly promised to pay back could not be indulged in. The plaintiff then brought the action reported in Volume 121 New York Reports. This action was brought against a defendant not a party to the first action and was based on the theory of conversion.

The plaintiff was again barred from relief. The Court of Appeals intimated that the court in the previous action was in error but held nevertheless (121 N.Y.168) that "The plaintiffs having by their former action, in effect, sold this very property, it must follow that at the time of the commencement of this one they had no cause of action for a conversion in existence against the defendant herein." This reasoning was based upon the premise that the plaintiffs by electing to sue in the first instance in an action "ex contractu" on the defendants implied promise to pay for the machinery, elected to treat the transaction as a sale. The conclusion arising from the premise was that since the plaintiff had treated the title to the machinery as having passed as to one defendant - they were bound by that election as to the whole world.

Stating the gist of their holding, the Court declared on Page 168: "When it becomes necessary to choose between inconsistent rights and remedies, the election will be final, and cannot be reconsidered even where no injury has been done by the choice, or would result from setting it aside. (2 Hermon on Estop. and Res. Adjud., 1172 §1045)."

The injustice of adherance to this rule has been realized by the judiciary itself. In Schenck v. State Line Telephone Co., 238 N.Y.308, the plaintiff alleged that he was the victim of fraud. He brought his first action at law to recover damages for fraud. The defendant answered, pleading the Statute of Limitations. The plaintiff recognized the sufficiency of the defense and discontinued the action before trial. He returned to the bar with a prayer for rescission. The defendant countered with the argument that the plaintiff had defeated himself by electing the first instance to ratify the sale in the action at law for damages.

The pen of the late Justice Benjamin N. Cardozo ruled otherwise. Delivering the opinion in the Schenck case he wrote (at Page 311) "An election of remedies presupposes a right to elect. (Henry v. Herrington. 193 N.Y.218, 222). It is 'simply what its name imports: a choice by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone' (Bierce v. Hutchins, 205 U.S.340, 346). If in truth there is but one remedy, and not a choice between two, a fruitless recourse to a remedy withheld does not bar recourse thereafter to the remedy allowed." The plaintiff was awarded the right to sue for rescission.

Acting on the recommendation of the New York State Law Revision Commission, Assemblyman Harry A. Reoux, Chairman of the Assembly Judiciary Committee moved to wipe out whatever remains of the doctrine of Terry v. Munger (supra). His Assembly Bill, Introductory No. 693, Print No. 1837, appears to accomplish this purpose effectively. The Bill provides:

§1. The Civil Practice Act is hereby amended by inserting therein a new section, to be §112-c, to read as follows:
§112-c. Actions in conversion and on contract; no election of remedies. Where rights of action exist against several persons for the conversion of property and upon an express or implied contract, the institution or maintenance of an action against one of these persons, or the recovery against one of them of a judgment which is unsatisfied, for the conversion or upon the contract, shall not be deemed an election of remedies which bars a subsequent action against the others either for conversion or upon the contract.
§2. This act shall take effect Sept. 1, 1939.

The legislation is accompanied by the following:

(Note: This is an amendment recommended by the Law Revision Commission. See Leg. Doc. (1939) No. 65 (F). Under the rule of Terry v. Munger, 121 N.Y.161, a person whose goods have been converted by several persons, and who, waiving the tort, sues one of such persons upon the theory of an implied contract, cannot recover against the others, in an action for conversion, even though his judgment in the first action remains unsatisfied. The amendment establishes that there is no election of remedies in a situation like the Terry case or in the converse situation. - - - "

At this writing the Bill has passed both Houses of the Legislature and rests in the hands of the Governor.

A similar injustice was born out of the tribulations of one George P. Steinbach. The case is briefly outlined in the action of Steinbach v. The Relief Fire Insurance Co., 77 N.Y.498. Steinbach procured a policy of fire insurance from the Insurance Company, which purported to protect him against fire on his "stock of fancy goods, toys, and other articles in his line of business, contained in his store, occupied by him as a German jobber and importer." The policy contained written permission "to keep firecrackers on sale" but no express permission to keep fireworks. Another clause stated that if the assured should use the premises "for the storing or keeping therein articles, goods or merchandise hazardous or extra hazardous, or specially hazardous - - " during the time of such use the policy should be of no effect.

The plaintiff first brought an action to recover upon the policy for the loss. The court held that the terms of the policy prohibited the keeping of fireworks and rejected proof offered by the plaintiff that fireworks constituted an article in the line of business of a "German jobber and importer" and the defendant was given judgment.

The plaintiff then brought the action reported in 77 N.Y.498 to reform the contract and to recover on the policy as reformed. The court, speaking through Justice Robert Earl, denied the plaintiff's prayer for relief by stating tersely (at page 502): "This is a case, it seems to me, where the doctrine of 'res adjudicata' must apply, and bar a recovery, unless plain principles of law, which have always been regarded as important in the administration of justice, are disregarded."

In 1935, the case of Allen v. U.S.Fire Insurance Co. of New York, 245 App.Div.31, af'd without op. 270 N.Y.597, the Appellate Division in the First Department reluctantly followed the rule of the Steinbach case. The plaintiffs in the Allen case had brought an action on an insurance policy. The judgment ruled that the loss suffered was not covered by the terms of the policy. The plaintiff then brought the action in question to reform the policy to correctly express the alleged intentions of the parties by including the loss. The court, Per Curiam stated: "On principle, there would seem to be substantial doubt whether the plaintiff should not be permitted to maintain this action on the theory of mistake. . . . The previous action merely held that the loss was not covered by the terms of the policy as they had been reduced to writing. It may, therefore, not unreasonably be contended that the issues are not identical and that the previous action is not "res adjudicata" here. We are, however, constrained to affirm the judgment and order (against the plaintiff), with costs, on the authority of Steinbach v. Relief Fire Ins.Co., 177 N.Y.498, cited with approval and followed in Schuylkill Fuel Corp. v. Nieberg Realty Corp 250 id. 304)."

The Nieberg Realty Case clearly demonstrated that the Steinbach ruling was still controlling law, but displayed an important variation which would discharge the operation of the rule in a

Univ. of Arizona Library

proper case. There the plaintiff sued five defendants on a contract for coal delivered. The defendants argued that their liability was several, not joint. The court sympathized with their plea, but pointed to a previous adjudication between the parties involving another liability under the contract which had determined otherwise. The defendants, however, also counterclaimed for reformation of the contract on allegations of mistake and fraud. Justice Cardozo drew an important distinction in sustaining the defendant's right to counterclaim.

The learned Justice explained that this action was brought upon another liability arising under the contract - entirely separate from that contested in the previous action. The previous judgment "will not be conclusive upon the question whether the terms should be reformed, for no such issue has been litigated" declared Cardozo. Continuing, he wrote, "The cause of action being different, i.e., for coal sold at other times and in response to other orders, the counterclaim must be tried before judgment may be rendered."

While Steinbach v. Relief Fire Ins.Co., (supra) was cited with approval in the Nieberg Realty case, the court referring to that case suggested: "A different question would have been presented if the loss had been a later one." (A loss arising out of a fire occurring subsequent to the one which gave rise to the first actions).

Again on the recommendation of the Law Revision Commission, Assemblyman Reoux introduced a measure to nullify the clinging rule of the Steinbach case. Assembly Bill, Introductory No.688, Print No. 1841, provides:

> §1. The Civil Practice Act is hereby amended by inserting therein a new section, to be §112-d, to read as follows: §112-d. Action on contract no bar to action to reform. A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed.
>
> §2. This act shall take effect September 1, 1939.

The accompanying memorandum expresses the intention of the introducer:

> "This is an amendment recommended by the Law Revision Commission. See Leg.Doc.(1939) No.65 (F). The amendment changes the rule of Steinbach v. Relief Fire Insurance Co. 77 N.Y. 498, and Allen v. U.S.Insurance Co., 245 App.Div.31, af'd without op. 270 N.Y.597, that an action to reform a written contract and recover upon it as reformed is barred by judgment in a prior action upon the contract, even though proof of the term sought to be inserted into the contract by the second action was inadmissible in the first action."

This measure awaits the signature of the Governor.

Similar injustices have been visited upon plaintiffs who select the wrong defendant. In Fowler v. Bowery Savings Bank, 113 N.Y. 450, a typical situation is presented. The facts, briefly stated, are these: One John White, the husband of Elizabeth White, deposited a sum of money in the defendant bank in trust for his wife. The deposit remained in the bank until John White died. His executor retained possession of the passbook which described the account, "Bowery Savings Bank in account with John White for Elizabeth White." Elizabeth White died. Her executor, the plaintiff herein, demanded the deposit from the bank. The bank refused unless the plaintiff presented the passbook. The husband's executor then appeared at the bank with the passbook and received the money. The plaintiff then brought an action against the husband's executor to recover the money. A judgment favoring the plaintiff was docketed, but remained unsatisfied.

The plaintiff then commenced this action against the bank. The court declared in 113 N.Y. 450, at page 455, "Nothing could be more inconsistent than an action against Flynn (the husband's executor), on the ground that the money due to the plaintiff had been paid to him, and an action against the bank, on the ground that it had not paid the deposit and still remained debtor therefor."

Explaining the plaintiff's rights the court asserted (pps 453-454), "After his demand of the deposit, and the payment of the money to Flynn, there were two remedies open to the plaintiff: He could sue the defendant as a debtor for the deposit and recover the amount thereof from it, or he could bring an action for money had and received to and for his use against Flynn, and recover it from him. But he was not entitled to both remedies at the same time, or in succession; and by electing the one he would lose the other. By electing to sue the bank he would repudiate its payment to Flynn and his claim would be that the debt had not in fact, been paid. By suing Flynn he would adopt and ratify the act of the bank in making payment to him, and his claim would be that the money due to him had, in fact, been paid to Flynn, and that Flynn had received it to and for his use. Such adoption and ratification of the payment would legalize the payment as between him and the bank and thus discharge the bank."

The Law Revision Commission urged Assemblyman Reoux to push legislation to obliterate this doctrine. As a result Assembly Bill Introductory No. 692, Print No. 1838, was introduced. The contemplated change provides:

§1. The Civil Practice Act is hereby amended by inserting therein a new section, to be §112-a, to read as follows:

§112-a. Rights of action against several persons; no election of remedies. Where rights of action exist against several persons, the institution or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others.

§2. This act shall take effect Sept. 1, 1939.

The introducer's note states:

"(Note: This is an amendment recommended by the Law Revision Commission. See Leg.Doc.(1939) No.65 (F). Under such cases as Fowler v. Bowery Savings Bank, 113 N.Y.450, a person having a claim against several wrongdoers, -all of them liable - who sues one of them, has been barred from suing any of the others. The amendment establishes that there is no election of remedies in this situation."

Only the Governor's signature is required to give this proposal the effect of law.

In Georgd v. Texas Co., 225 N.Y.410, the plaintiff's assignor sold saturated felt to the American Oil Cloth Company. The assignor was ignorant of the fact that the latter Company, when it purchased the felt, was acting for the defendant in this action, The Texas Company. The purchase price remained unpaid. After acquiring full knowledge of the agency relationship, the plaintiff brought an action against the Oil Cloth Company and recovered judgment. The execution which followed remained unsatisfied and the Oil Cloth Company was adjudicated bankrupt.

The plaintiff then moved against the principal, The Texas Company, in this action. The Court of Appeals barred the action. The opinion declared: (225 N.Y.410, 412) "When a person contracts with another who is in fact an agent of an undisclosed principal, he may upon discovery of the principal resort to him or to the agent with whom he dealt, at his election, but if after having come to a knowledge of all the fact he elects to hold the agent, he cannot afterwards resort to the principal." Concluding the Court held (p.417) "The plaintiff, therefore, by reason of his assignor's action in determining to follow the agent for the purchase price instead of the principal after having full knowledge of all the facts is barred upon the evidence here presented from recovering in this action against this defendant."

This rule will fall into discard if Assembly Bill, Introductory No. 694, Print No. 1842, by Assemblyman Reoux is enacted into law. The proposal, also recommended by the Law Revision Commission, provides:

§1. The Civil Practice Act is hereby amended by inserting therein a new section to be §112-b, to read as follows:

§112-b. Rights of action against agent and undisclosed principal; no election of remedies. Where rights of action exist against an agent and his undisclosed principal, the institution or maintenance, after disclosure of the principal, of an action against either, or the recovery of a judgment against either which is unsatisfied, shall not be deemed an election of remedies which bars an action against the other.

§2. This act shall take effect September 1, 1939.

The memorandum on this bill explains:

"This is an amendment recommended by the Law Revision Commission. See Leg.Doc.(1939) No. 65 (F). Under the rule of Georgi v. Texas Co., 225 N.Y.410, one who sues an agent, and learns of the existence of a principal before judgment in the action, cannot enforce his right against the principal even though judgment against the agent remains unsatisfied. The amendment establishes that there is no election of remedies in a situation like the Georgi case or in the converse situation."

Both the Senate and the Assembly have approved this legislation, and it awaits the action by the Governor.

The notation by Assemblyman Reoux on each of the above bills concludes with the statement: "The purpose is to bring the law in this field into accord with the decisions in Schenck v. State Line Telephone Co.,238 N.Y.308 and Clark v. Kirby, 243 N.Y.295, limiting the doctrine of election of remedies to avoid injustice."

We have already referred to the Schenck case, and it is needless to review the facts and holdings in Clark v. Kirby (supra). However, in the latter case, the present Chief Judge, Frederick E. Crane, significantly stated:

"All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish. Unless some necessary requirement has been omitted, a wrong move or a mistake in the method of seeking relief from the courts ought not to furnish protection for a wrongful act."

The majority of the cases discussed display injustice. We ar irrestibly led to the conclusion, by reading them, that some evil rests on the scale of equity and justice. That evil rests not in the courts - for they are but stating well-established principles of law. They sit to interpret, not to make the law. They may not trespass into the sanctuary of legislative domain. True, they may point the way - and they have done so.

The Legislature has followed that train blazed by the pens of the men who meet the injustice, but are powerless to rectify them. The law-making units have recognized that "a mistake in the method of seeking relief from the courts ought not to furnish protection for the wrongful act." This omen of legislative consciousness inspires the devotee to the legal science into the realization that the law will meet the needs of people - and that the needs of people will not be ignored because they fail to fit inflexible patterns of law.

Leaving the problem of election of remedies, we consider briefly the state of the law as it relates to the power of infants to disaffirm contracts entered during their minority. We face first the cardinal principle that "The privilege of infancy is to be used as a shield and not as a sword." (Kent. Vol.2, p.240; Rice v. Butter, 160 N.Y.578.) Tender feelings for the young rapidly sieze upon this maxim as being just. The picture of sly schemer preying upon the innocent child fits well into the vil-

lain's melodrama and arouses the ire of the decent. But well-sounding words and tender feelings cannot obliterate the reality of the shield that has been hammered into a sword by the infant who possesses the ability to defraud, and lacks character to do equity. The books are filled with cases of misplaced confidence in an infant who would bring destruction upon his victim.

In Joseph v. Schatzkin, 259 N.Y.241, the infant gambled in the stock market and lost. Disaffirmance followed and a lawsuit was born. The court, reviewing the case (;.243). observed that the infant "candidly admits the obvious truth that he would have been content with his contract and would have accepted its advantages," if the transactions had resulted in profit. Associate-Justice John F. O'Brien, speaking for the court, remarked, "Whatever may be the individual opinion respecting the commercial ethics of one who, after loss instead of profit in speculation, rescinds the agreement into which he voluntarily entered, the rule is clear that the property of a minor is tenderly safeguarded by the law (Green v. Green, 69 N.Y.553) and it confers upon him the right to discard liability toward those who in good faith have dealt with and trusted him. At their peril merchants and traders and all others maintain financial relations with that type of minor who is willing to avail himself of his legal prerogative to repudiate engagements whicy many regard as moral obligations. In a case such as the one before us, courts are limited to the function of ascertaining and declaring the rule relating to the measure of damage."

True, the courts are "limited", but the Legislature is not. Working hand in hand again, Assemblyman Reoux and the Law Revision Commission drafted Assembly Bill, Int. No. 697, Print No. 1944. The essential part of this Act provides:

§1. Chapter 17 of the Laws of 1909, entitled "An act relating to debtors and creditors, constituting Chapter 12 of the Consolidated Laws," is hereby amended by inserting therein a new article, to be Article 9-a, to read as follows:

ARTICLE 9-A - Infants' Contracts. §260, Infants' Contracts; when they may not be disaffirmed.

1. A contract hereafter made by an infant after he has attained the age of 18 years may not be disaffirmed by him on the ground of infancy, (a) where the contract was made for purposes of the infant's education at an institution duly accredited by the Board of Regents of New York State and was reasonable and provident when made, or

(b) where the contract was made in connection with a business in which the infant was engaged and was reasonable and provident when made.

2. In any action or proceeding in which the right to disaffirm on the ground of infancy a contract made by an infant after he has attained the age of 18 years is in issue, the burden of proof on the question whether the contract

was made for purposes of the infant's education, as above set forth, or in connection with a business in which the infant was engaged, and also on the question whether the contract was reasonable and provident when made, shall be upon the person seeking to deny or defeat such disaffirmance or to enforce the contract. * * * * *

§3. This act shall take effect September 1, 1939.

The Assembly has already acted favorably upon this Act and has sent it to the Senate where passage is expected in the near future.

Finally, we turn briefly to consider the problem of contribution among joint tortfeasors. Our original plans included a detailed discussion of the entire problem with the desire to focus attention upon a probable change in existing law governing this situation. However, the proposal designed to effect the modification appears to have died in the Legislative Committee. It is, however, probable that another year will bring about the adoption of a measure similar in nature.

Chapter 714 of the Laws of 1928, added §211-a to the Civil Practice Act. It read as follows: §211-a. Action by one joint tortfeasor against another. Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment, provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice.

In Fox v. Western New York Motor Lines Inc., 257 N.Y.305, the court discussed the effect of this section. Judge Crane stated: (p.308) "Section 211-a sought to remedy one glaring defect in the law. Where a judgment had been recovered against two joint tortfeasors, the payment by one relieved the other of all liability, either to the plaintiff or to the paying defendant. This was changed by requiring the joint defendant to pay his share of the judgment. This is the only change that has been made. A plaintiff may now sue as many defendants as he pleases whom he thinks may be liable in negligence for his damages. The Legislature has not yet given this same choice to the defendants to bring in other parties, whom they think should be liable either in place of or jointly with those whom the plaintiff has selected."

The measure designated to give "this same choice to the defendants" was another product of the Reoux-Law Revision Commission efforts (Assembly Int. No. 698, Print No.720). It would serve no useful prupose at this time to outline the twenty-odd pages of contemplated law included in the proposal. The thought in the

minds of the drafters is expressed sufficiently in their memorandum

> §211-a of the Civil Practice Act does not provide an adequate system of contribution among tortfeasors. The requirement of a joint judgment as a condition precedent to the operation of the section, and the refusal of the courts to permit one of several tortfeasors, against whom an action has been brought, to bring in the other tortfeasors as parties to the action, have made the substantial right of contribution among defendants dependent upon the election of the plaintiff. This bill is designed to meet the objections to §211-a and to establish in tort cases substantially the same principle of contribution as is now established in contract cases."

It is perhaps unnecessary to close with words of caution. However, it is to be noted that none of the measures set forth herein have become law at this writing. The proposals, however, are free from any partisan entanglements - and, with the exception of the last one mentioned, will, in all probability, become Chapters of the Laws of 1939.

R. BURDELL BIXBY

AUTHOR'S NOTE: Subsequent to the writing of the above, Governor Herbert H. Lehman has approved the four bills relating to the election of remedies:

Assembly Intro.No. 692, Print 1838, by Mr. Reoux; to amend the Civil Practice Act, in relation to election of remedies by action against one of several persons. Chapter 126 of Laws of 1939.

Assembly Intro. No. 693,Print 1837, by Mr. Reoux: to amend the Civil Practice Act, in relation to election between remedy by action for conversion and remedy by action upon contract. Chapter 127 of Laws of 1939.

Assembly Intro. No. 694, Print 1842, by Mr. Reoux: to amend the Civil Practice Act, in relation to election of remedies by action against agent or undisclosed principal. Chapter 128 of Laws of 1939.

Assembly Intro. No. 688, Print 1841, by Mr. Reoux: to amend the Civil Practice Act, in relation to action upon a contract as a bar to an action to reform the contract. Chapter 147 of Laws lf 1939.

R.B.B.

SALUTING THE AMERICAN FLAG v. RELIGION

(People v. Sandstrum, 279 N.Y.523)

In a decision recently handed down by the New York State Court of Appeals, the Court found the opportunity to express itself on the question of whether students in the public schools may be forced to salute the American Flag, when, in their conscience, they believe it to be against their religion. This question merely reflects on the general principle that the liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State.

The facts in the case, People v. Sandstrum are: The defendants are members of the religious order known as Jehovah's Witnesses. Part of their belief is that allegiance is due only to God and that saluting the National Flag is placing this symbol above the Almighty.

The district school at Lake Ronkonkoma, town of Brookhaven County of Suffolk, pursuant to the regulations of the Commissioner of Education, as required by §712 of the Education Law, had a simple ceremony of saluting the Flag. Grace Sandstrum refused to take part in these ceremonies. For such refusal she was sent home Her parents immediately caused her to return. Every time she refused she was sent home. Every time she was sent home she was sent back again by her parents. She never refused to attend school; she merely refused to comply with the regulations or to take part in the ceremony.

This proceeding was taken before the Justice of the Peace to punish the parents according to certain provisions of the Education Law. These provisions spell out the following procedure: "If the parent refuses to send the minor to school or refuses to cause him to attend upon instruction, the parent can be punished as provided by law. The minor himself who is insubordinate or disorderly or refuses to obey regulation may be expelled or, for continual insubordination or non-attendance, may be sent upon proper notice to a parental school."

The information stated "that they wrongfully and unlawfully, and maliciously did keep one Grace Sandstrum from attending upon full time instruction in the public school, she being a minor between seven and sixteen years of age."

When the Court of Appeals rendered its decision, Chief Justice Crane wrote the opinion. Referring to the information, he wrote: "The fact is, as is evidenced throughout the entire record that the parents did nothing of the kind. If the young girl was insubordinate and disobedient to all the proper orders and regulations of the school, she is the one that should have been dealt with under the provisions of the Education Law. In like cases where this same question has arisen the procedure has always been to expel the student, not to punish the parents unless they in some way have disobeyed the law."

After deciding the question of the guilt of the parents, the court went one step further and looked into the claims of the appellants as to the justification of Grace Sandstrum in her refusal to salute the National Flag. They claim that to compel her to salute the Flag contrary to her religious convictions is contrary to the religious provisions of the State Constitution. (Art.I §3).

Chief Justice Crane, answering the claim of the appellants, said, "Saluting the Flag is in no sense an act of worship or a species of idolatry, nor does it constitute any approach to a religious observance. The Flag has nothing to do with religion, and in all the history of this Country it has stood for just the contrary, namely, the principle that people may worship as they please or need not worship at all. On the other hand, our Constitution, both Federal and State, recognizes that a religious belief, whatever it is, cannot interfere with the laws which the State enacts for its preservation, safety, or welfare.

"There is another strength which is necessary to preserve the Government besides military force, and that is the moral strength, or public opinion of its citizens. Public opinion is as vital to the maintenance of good government as an army and navy, in fact these latter can be destroyed quicker by public opinion than by the attacks of an enemy. The State, therefore, is justified in taking such measures as will engender and maintain patriotism in the young."

The State of New York has provided "such measures as will engender and maintain patriotism in the young." Section 712 of the Education Law makes it the duty of the Commissioner of Education to prepare for the use of public schools of the State, a program providing for a salute of the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient.

As to this Section the court held, "Section 712 never intended to force patriotism upon children by a militaristic order. It seeks to teach, to enlighten, to reveal, to lead the mind, to understand and appreciate what our Government really is and what the Flag stands for. The young girl is deep in her reverence for the commands of the Old Testament. We hope, and so evidently did the Legislature, that by a course of instruction in our public schools, the children will see that justice, that mercy, and that humility which is the burden of Holy Writ, is also the aim and object of the things the American Flag stands for.

"The program of the Commissioner of Education was in accordance with the Education Law, not contrary to any rights preserved by the Constitution. Faith in our fine educational system and its corps of efficient teachers leads one to believe that with a little more patience and some tact, as the child grows in knowledge a reverence for our Flag will develop, and she will be glad that it is still here to salute."

However, there are many in the ordinary pursuits of life as well as in the field of law who firmly believe that to compel one

to salute the Flag contrary to his religious conscience is an infringement of the liberty guaranteed by the Fourteenth Amendment. They interpret the liberty guaranteed by that Amendment to include the safety, health, morals, property, or personal rights of the people. To require students to participate in the ceremony of saluting the Flag, when it runs counter to religious convictions sincerely held by them, as a condition of the exercise of the right to attend public schools, would violate not only the Federal Constitution but also the State Constitution.

The other judges on the bench agreed with Chief Justice Crane. Judge Lehman, concurring in result, disagreed with the other judges on the claim of the appellants, and wrote a separate opinion. To discover the basis for the belief which some people have, it would be necessary to read it.

He wrote, "Religious freedom guaranteed by the Constitution is broader than the principle that people may worship as they please or need not worship at all. It includes the right of the individual to carry out every obligation which he believes has a divine sanction, 'to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights.'

"With man's relations to his Maker and the obligation he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the law of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.

"Grace has chosen to obey what she believes to be the command of God. There is no disrespect to the Flag in refusal to salute the Flag by a child who has been taught that it is a moral wrong to show respect in the form of a salute. She does not refuse to do an act which might promote the peace, safety, strength, or welfare of her country. She does not refuse to show love and respect for the Flag. She refuses only to show her love and respect in a manner which she believes her God has forbidden.

"The Flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of a secular authority which clashes with the dictates of conscience. The Constitution does not permit and the Legislature never intended that the Flag should be so soiled and dishonored."

Regardless of the opinion of Judge Lehman, and regardless of the opinion of many others, the law is, until the dictum in People v. Sandstrum is reversed, on the side of the plaintiff, "Saluting the American Flag."

HARRY ROBERT ROSENBLUM

N O T E S

OLLENDORFF WATCH CO. v. PINK.- The Court of Appeals has reversed the holding of the Appellate Division in its decision of Ollendorff Watch Co. v. Pink, 279 N.Y 32. The Appellate Division case was cited in an article on Insurance concerning contracts which contain contingent incidental benefits, and when such contracts come under the Insurance Law, Albany Law Review, Vol.VII No. 3, p.96.

The Watch Company delivered with each watch sold a certificate, in which the Company agreed to replace such watch with a new one of like quality and value, provided the first was lost within one year from the date of purchase, in the United States or Canada, through burglary or robbery. The agreement stated that the Watch Company added no charge to the sale price of its watches for the promise. The cost of an insurance policy with the Travelers Insurance Company was stated to be borne by the Ollendorff Watch Company out of its corporate income from various sources, including the sale of watches and was charged on the books as an item of expense incident to the business in which it was engaged. The policy referred to insured the Watch Company against all losses sustained by reason of these replacement agreements with its customers.

The Appellate Division felt that the vital element of consideration was absent and that therefore the agreement was not an insurance contract, the money being paid by the vendee wholly for the purchase of a watch and not at all for insurance, 253 A.D.73.

Justice Crane, writing for the Court of Appeals stated that the contract was neither a warranty nor a guaranty. A warranty would relate in some way to the nature or efficiency of the product sold - in this case that the watch would work or was of a certain make of fineness. It would not cover a hazard having nothing to do with the make or the quality of the watch. A guaranty is an undertaking that the amount contracted to be paid will be paid, or the services guaranteed will be performed.

This contract is an extraneous inducement to procure sales. If the watch is stolen the seller will replace it. In other words, he takes a chance or risk of theft from his customers; that is, he insures them for a year against such risk. The premium to the Travelers Insurance Company comes ultimately out of the purchase price of the watch.

This seems more reasonable than the Appellate Division's view that the inducement of the assumption of the risk must have been a large part of the consideration sought by the vendee.

The Court of Appeals went on to state that while the Insurance Law of New York does not define a contract of insurance, the Massachusetts statutory definition: "A contract of insurance

is an agreement by which one party for a consideration promises to pay money or to do an act valuable to the insured upon the destruction, loss or injury of something in which the other party has an interest", is a statement of the common law as it exists in the State of New York and the agreement of the Ollendorff Company falls within it.

This decision apparently does not amount to a definition of insurance for once and for all but means that the courts of New York still fall back on the common law conception of insurance in the absence of a statutory definition and that in this case the Massachussetts definition seemed to the court to fit its idea of the common law.

J. R.

* * * *

PEOPLE V. SHEARER.- In the case of People v. Shearer, 169 Misc. 69, the defendant moved for a dismissal of the indictment upon the ground that one of the members of the grand jury was a woman, and therefore disqualified by virtue of Subd.4 §267-cc of the Code of Criminal Procedure which provides that grand jurors should be "possessed of the qualifications required by law of persons to serve as jurors for the trial of issues of fact and not exempt from serving as such jurors." Previous to her service upon the grand jury, the woman in question had filed with the commissioner of grand jurors a sworn statement that she did "not claim to be exempt or disqualified from jury service."

The court meets the defendant's contention by observing that §720 of the Judiciary Law does not disqualify all women, clergymen, physicians, and lawyers, but provides that this class of persons, "although qualified, is entitled to exemption from service as a trial juror upon claiming exemption therefrom."

By this section women are made eligible for an exemption from jury service; an exemption which can be granted if it is claimed. This particular woman never having claimed her right to exemption, but on the contrary having expressly waived it, was therefore a qualified grand juror.

It would seem from this decision that women in this State are now eligible to sit upon a grand jury as well as a trial jury, unless they claim the right to the exemption given them by the Judiciary Law.

H. R. E.

* * * *

EQUAL PROTECTION FOR THE NEGRO.- When a Negro needs a friend he goes to the United States Supreme Court. That Court says that

"equal protection" means "equal protection", and, to use a trite phrase, will "accept no substitutes." The officials of the University of Missouri said: "You've got to show me", and the Supreme Court did - in the case, State of Missouri, at the Relation of Lloyd Gaines v. S.W.Canada, 83 L.Ed. 207.

Missouri has a state university attended exclusively by Whites. It also has Lincoln University, which provides similar training for Negroes. But the state university has a law school while Lincoln University has none. Lloyd Gaines, a Negro, was graduated from Lincoln University and sought to enter the School of Law of the University of Missouri. He was denied admission on the ground that it was "contrary to the constution, laws and public policy of the State to admit a Negro as a student."

Apparently determined to obtain his legal education from the courts if unable to get it at the University, Gaines brought an action for mandamus in the Missouri courts. They denied him relief and he reached the Supreme Court upon certiorari.

Respondents called attention to the Revised Statutes of Missouri §9622, which provided that arrangements might be made "for the attendance of Negro residents of the State of Missouri at the University of any adjacent State to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance." It was further shown that comparable training is afforded by the law schools of four adjacent states which admit non-resident Negroes.

No improvement can be made upon the lucid language of Mr. Chief Justice Hughes in stating the main part of the decision, when he said: "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for White law students which is denied to Negroes by reason of their race. The White resident is afforded legal education within the State; the Negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

"The equal protection of the laws is a 'pledge of the protection of equal laws.' Yick Wo v. Hopkins, 118 U.S.356, 369, 30 L.Ed. 220, 226, 6 S.Ct. 1064. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction."

J. W. M.

LAW REVIEW BOARD

H. Gordon Turner, Editor-in-Chief

Associate Editors

Emil Stanislaus Bartle — George Burt Grow
R. Burdell Bixby — Wilford Arnold LeForestier
Richard Bell Congdon — Harvey Mervin Lifset
Russell Frank Crego — James Westcott Moore
Arthur Ansty Darrigrand — Harry Robert Rosenblum
Hugh Ross Elwyn — John Ross
Clarence Henry Girard — Joseph Serino

TABLE OF CONTENTS

ARTICLES

New York Doctrine of Cy Pres.....113

The Effect of Testamentary Conditions Relating to Legatee's Marriage or Separation.....120

Res Judicata in Tax Certiorari Proceedings...131

Movie Censorship.....137

NOTES

Steitz v. Gifford, 280 N. Y. 15 141

Auto Dealers Discount Corp. v. Santora, 170 Misc. 365..... 142

NEW YORK DOCTRINE OF CY PRES

A client enters a lawyer's office intending to make a will. He wishes to leave his property in trust so that it may be utilized to found a hospital by the city, and in case the city should refuse or be otherwise unable to take, he wishes it to go to his heirs. How is the lawyer to draw such a will so that this intent will be effectuated? What the client will do by his will is, set up a charitable trust, which is unlike other trusts, in that the beneficiaries need not be definite and the statute of perpetuities is inapplicable. (Allen v. Stevens, 161 N.Y. 122; Matter of Robinson, 203 N.Y. 380). Peculiar to these trusts is the cy pres doctrine whereby the court looks at the instruments by which they are created, to ascertain what the intent of the testator was, and to carry out that intent as nearly as possible (Bogert on Trusts, p. 1287). It is the lawyer's problem to ascertain the extent of the application of this doctrine and to draw his will accordingly. This article proposes to meet this problem

The doctrine itself is old, but its application in New York is new. It harks back to Roman law, and it early became a part of the English law. (See Norman Church v. United States, 136 U.S. 1; Zollman on Charities, p. 71; New York State Bar Ass'n Bulletin, June, 1937, p. 74). In England the law of charitable trusts and cy pres came from three sources: (1) the jurisdiction of the Court of Chancery over trusts, (2) prerogative of the Crown, (3) Statute of Charitable Uses, passed during the reign of Queen Elizabeth. It is with (1) that this article is concerned, as it is on this that our New York law is based. For explanation of (2) and (3), see Bogert on Trusts, p. 1287, Zollman on Charities, p. 72, Utica Trust Co. v. Thomson, 57 Misc. 31; Williams v. Williams, 8 N.Y. 525.

After the revolution, many states, New York included, passed statutes declaring inoperative the statutes of England. (Ch. 46 Laws of 1788 §37. Also see I.R.S. Part 2 Ch. 1 Art.2 §45 p.727). The question then arose, whether or not this abolished the Englis charitable system and along with it the cy pres power of the court. In Williams v. Williams, supra, the negative was ably presented and the court concluded that having adopted the common law of England, the law of charitable uses was in effect as it was not built on statute, was in force here before the revolution and was not repugnant to our institutions. In spite of this decision the affirmative emerged victorious. In a line of cases running from Owens v. Missionary Society, 14 N.Y. 380, through Beekman v. Bonsor, 23 N.Y. 366, Bascom v. Albertson, 34 N.Y. 584, and culminating in Holmes v. Mead, 52 N.Y. 332, the court held that the system of charitable uses as recognized in England had no existence in New York. "There would be no occasion to resort to the cy pres doctrine of the English Court of Chancery which has not been followed in courts of this state." (Holmes v. Mead, supra).

From this time until 1893, the cy pres doctrine was dead, and during this time many charities failed. In the case of Tilden v. Green, 130 N.Y. 29, by a decision in which three judges dissented, the court was unable to sustain a trust to furnish a free library for New York City and to promote scientific and educational purposes. In the dissenting opinion of Allen v. Stevens, 33 A.D. 485, it was said of the Tilden case that once again the Court had invalidated a munificent charity with the declaration that "the equitable rule that prevailed in the English Court of Chancery, known as the cy pres doctrine and which was applied to uphold gifts for charitable purposes when no beneficiary was named, has no place in the jurisprudence of this state."

As a result of this case the Legislature, in 1893, passed the so-called "Tilden Act", which, as amended in 1901, expresses the New York law on charities and cy pres. (Ch. 701 of Session Laws). In Allen v. Stevens, 161 N.Y. 122, the court reversed the Appellate Division and held that the Tilden Act restored the law as announced in Williams v. Williams, supra. Our present statute declares that no grant to charity will be invalid because of indefiniteness of beneficiary. (Personal Property Law §12 subd.1; Real Property Law §113 subd. 1). And where circumstances have changed since the execution of an instrument containing the grant to charity so as to render impracticable or impossible a literal compliance with the terms of the instrument, the court may direct that such gift shall be administered or expended in such manner as will most effectually accomplish the general purpose of the instrument without regard to, and free from, specific limitations and directions therein. (Personal Property Law §12 subd.2; Real Property Law §113 subd.2).

One might expect that after the passage of the Tilden Act and the decision in Allen v. Stevens, the courts would be zealous in upholding charitable trusts and liberal in their applications of the cy pres power in view of prior failures. This is precisely what has happened, and at times it is to be wondered whether or not they have overstepped its bounds.

Little has been said, up to this time, as to what this doctrine is, what brings it into play, and what it does after it has been brought into play. This was purposely omitted because the law on these questions in New York has necessarily been developed since 1893.

The doctrine of cy pres is primarily a rule of construction whereby the intent of the donor is ascertained and then carried out - which, in the last analysis, is the general object of the law. It is brought into play where there is a valid charity which fails because of inadequacy or impossibility, and the testator is found to have had a general charitable intent. After it is brought into play the court will then execute the gift another way which in its discretion approximates as closely as possible the testator's way. Like so many principles of the law, the difficulty with the doctrine is not with its statement but with its application. What is a charity? What is a valid approximation of the testator's intent and what is an undue

extension? When is the testator said to have had a general and when a particular intent? These questions are to be answered when the doctrine is sought to be applied. Their solution lies not in any general rules but in the facts of each case. A discussion of the questions and an analysis of some of the leading cases will follow. For the material above see Camp v. Presbyterian Church of Sackets Harbor, 105 Misc. 139; 17 Boston University Law Review 763; American Law of Charities, by Zollman p. 71.

First as to the question, what is a charity? In Matter of Shattuck, 193 N.Y. 446, the residuary was devised in trust, the rents and profits to be paid to religious, educational, or eleemosynary institutions. The court held this invalid because in the construction of the word "institution" it was held that the trust might be devoted in whole or in part to private use.

The effect of this case was to limite the courts in their interpretation. However, the authority of the case was not lasting. In Matter of Frasch, 245 N.Y. 174, the will gave to a bank the control of a large benefaction with the direction to pay the income to certain "institutions" to be selected with the advice of the American Chemical Society to obtain results of practical benefit to agricultural development. This the court held valid saying that not every charity is mentioned in the statute and that conceptions of public charity change with the passing of generations. When faced with the Shattuck case, the court pointed out its narrow limits and in dealing with the word "institutions", said, "where intention to provide for a public charitable use may be inferred, the word 'institution' need not be given a construction that contravenes that intention."

In Matter of Durbrow, 245 N.Y. 469, the executor was directed to distribute where he or she in his judgment shall consider it will be most effective "in the advancement of Christ's kingdom on earth." This was upheld, the court saying that testator's language should be construed in a broad and liberal spirit in accordance with his intention and the gift upheld although the will may have been susceptible of a construction which would permit the gift to be used for private purposes. Referring to the Appellate Division decision which was reversed it was said, "It is based on Matter of Shattuck which has been strictly confined to its own facts by later and better considered cases."

In Matter of Hall, 156 Misc. 841, aff'd 272 N.Y. 428, the court with reference to the Shattuck case, expressed the hope that "if this controversy reach the Court of Appeals the Court will now say that it is not sound as a guide to interpretation of the terms in charitable gifts." The Court of Appeals by its affirmance evidently felt that the Shattuck case has already been fully disproved. (New York State Bar Ass'n Bulletin, June, 1937, p. 74).

With the fall of the Shattuck case it becomes quite evident that the court, by means of the most liberal rules of construction will, if a public benefit can be found, construe the gift as a

charity, and in Matter of Walter, 150 Misc. 512, the court held that a bequest will be devoted to the purposes of charity even where there is no formal trust. A gift in trust will be presumed

When is a testator said to have had a general, and when a particular, intent, and what is a valid approximation of the testator's intent, and what an undue extension? These questions will be illustrated together because the cases necessarily take up both points, for in dealing with cy pres the courts exercise two functions - one of construction, and the other of administration. The cases will illustrate that the courts go far in reading a general charitable intent into the instrument (37 Harvard Law Review 263), and they are given a wide discretion in approximating the testator's particular intent. Where it can be said that the testator had a general charitable intent - that he intended to give something to charity - the means by which he does it is said to be his particular intent. Where this intent fails the courts will formulate another, the theory being that, had the testator lived, he would have done likewise. It must be pointed out that where the testator had a particular object in mind, and none other, - and that object cannot be accomplished, the charity must fail and the next of kin take. (Camp v. Presbyterian Society of Sackets Harbor, 105 Misc. 139, Bogert on Trusts p. 1287, Moggridge v. Thackwell, 7 Ves. Jr. 36.)

Perhaps the principle can be further illustrated. It is similar to a person who wishes to go to a city to which many roads lead. Should one of these roads become impassable he would take another. His primary or original intent is to reach the cit and his particular intent is that it be by a certain road. Should he be unable to arrive there by way of that road he will not be frustrated but will take another so as to satisfy his general intent. Now on the other hand, suppose he merely wishes to trave along a certain road which happens to lead to the city. Here he has no general intent to reach the city, but rather a particular intent to travel on this certain road, and should it become impassable no further attempt would be made to reach the city for this was not the purpose for which the particular road was travelled.

To illustrate the latter concept first, the cases of Teele v. Bishop, 166 Mass. 341, In re Harwood, 1 Ch. 285, (See 17 Boston University Law Review 763), and Saltsman v. Greene, 136 Misc. 497, will be taken. In Teele v. Bishop, the gift was to be used to build a church in an Irish village to be used for public worship under the Catholic Church. The village was small, and tc poor to support a church and so could not take the bequest as provided. The court held that there was no general charitable intent but the fund was limited to a particular object, now impossible of fulfillment, and so cy pres does not apply.

In the Harwood case testatrix left a sum to the Wisbeck Peac Society, Cambridge, Peace Society of Belfast and Peace Society of Dublin. The first had ceased to exist before the death of the testatrix and there was no evidence that the other two had ever existed. The court held that as to the first, the care taken to

name, negatived a general charitable intent and the legacy lapsed, but that the other two indicated a general charitable intent to promote peace and it should be applied cy pres by award to other organizations of similar purpose.

In Saltsman v. Greene the gift was to executor in trust to use under his direction to repair and beautify the Baptist Church in the Village of Virgil. The church had ceased to exist and its assets had been taken over by the Baptist Missionary Convention. Court held that the purpose of the trust failed and that any construction providing for turning over the money to the Baptist Convention would require the court to make a new will for the testat not founded upon any intent evidenced by him in his will.

As intimated above, the courts are reluctant to find this particular intent but are very anxious to sustain the charitable trusts by reading in a general intent. So to the chass of cases embodying the former concept, references will now be made in an endeavor to see to what extent the courts have gone.

In Matter of MacDowell, 217 N.Y. 454, the testatrix gave a fund, the income of which was for a home for refined, educated, Protestant gentlewomen. Preference was given to certain relatives and friends and they were required to pay a certain amount toward the upkeep. The court held that here was a general charitable intent not marred because of the preference or payment by the beneficiaries and that if the Supreme Court could not cause this first to be carried out according to the testator's scheme it would be applied to other charities as nearly as possible like that specifically mentioned in the will.

In Sherman v. Richmond Hose Co., 230 N.Y. 462, the income of the bequest was to be devoted to the reasonable uses of the Hose Company organized to provide fire protection to the village. The company dissolved and the court applied the fund cy pres to the inhabitants of the village to be used for the protection of its inhabitants against fire.

In Matter of Walter, 150 Misc. 512, to which reference has previously been made, the testatrix bequeathed her estate to seven organizations, one of which, shortly before her death became bankrupt and ceased to function. Cy pres was applied and the gift given in equal shares to the other named beneficiaries.

In Matter of Gary, 161 Misc. 351, aff'd 248 A.D. 373, 272 N.Y. 635, a woman bequeathed to a museum certain dinner service, jewels, and paintings, under certain conditions. Residue of the estate was given for the maintenance of the bequest. At her deat there was no residue but merely enough to pay one-half the legacies. The court ratified the executor's acceptance of a museum's offer by which the jewels would be sold, the legacies paid, and a residue left. The Appellate Division held that the Surrogate could modify the terms upon which the bequest was made when it appeared that literal performance had become impracticabl or impossible of literal fulfillment. It is not decisive that the disposition will result in a deviation from the original term if the general charitable intent is carried out.

The two most recent cases on the subject further illustrate the extent to which the court will go to uphold these trusts.

In Matter of Fletcher, 166 Misc. 486, aff'd 255 A.D. 843, there was a trust fund to build and maintain a hospital in Franklin Mass. Should it be invalid or inoperative, the fund was to go to Charles Chadwick. Now after 14 years the trustees claim the sum inadequate and seek to invoke cy pres to have the money applied to other nearby hospitals to be used primarily to benefit Franklin residents. The court held that there is a general charitable inten to benefit Franklin residents and where it cannot be carried out in the precise manner indicated, cy pres will apply the property in another manner as long as it is in furtherance of the general intent. Furthermore the court said the word "inoperative" did not cover this situation because the testator was presumed to know the court would exercise its cy pres power and save the trust for charity.

In the Matter of Neher, 279 N.Y.370, a woman gave her home in Red Hook to the village as a hospital for the benefit of the people of Red Hook. The village accepted in 1931 and now in 1937 it asserts that it has no resources to build a modern hospital and that one in Rhinebeck adeuqtely serves the needs of both villages, therefore it seeks a decree permitting it to take the property and to erect and maintain a building for administration purposes. This the Surrogate refused, holding that to read into the will the general intention to devote the gift to charitable uses instead of limiting it to a hospital would be contrary to testator's expressed intention. The Appellate Division unanimously affirmed without opinion (254 A.D.708) and the Court of Appeals reversed with three judges dissenting without opinion. The majorit held that the testator's intention was a gift to the whole community. To this general intent was grafted a way in which it was to be carried out. This having become impracticable the gift may be exercised cy pres through a scheme formulated by the court to carry the general purpose.

This case can be justly criticized on two grounds. The court has correctly stated the principles but the facts are a misfit. (Restatement of Trusts, p. 1211). In the first place, what the court does is read into the will a fictional general intent where in reality it is doubtful whether one ever existed. It is effecting its benevolent intent rather than that of the testator. (Zollman on Charities, p. 71.) Had the will read "I give a hospital to the people of Red Hook" rather than "I give to the people of Red Hook a hospital," would the decision have varied? It would appear so, because by strictly constructing the sentence in the latter order the court was able to find the necessary general intent. In the second place assuming the court correctly found the general intent, what has happened to the principle that it must be administered with as close approximation as possible to the testator's way. (Camp v. Presbyterian Society of Sackets Harbor, 105 Misc. 139. Certainly where the testator has expressly said that he wished to benefit the citizens by a hospital, for the court to hold that they were to be benefited by an administration building is an overstepping of the court's discretionary bounds.

As the cases analyzed show, cy pres has proceeded from a dormant to an extremely active life. So greatly has the rule been extended by the later cases that the Court seems to have overlooked the fact that injustice can as readily result from an enforcement of a non-existent general charitable intent as a non-enforcement of an existent one. Should this liberalized policy continue, and the indications are that it will, we shall find the courts enforcing charitable trusts as such, thus once again reducing cy pres to dormancy. Indeed, it is to be wondered whether this is not the substance of the last two decisions analyzed.

To return to the problem originally asserted in this article, it would seem that the lawyer, in view of the discussion on cy pres herein, would have expressly to include a disclaimer of any general charitable intent in order to be certain that the intent of his client would be effectuated. With anything less assertive the risk of the court thereafter finding a general intent and applying the trust cy pres would have to be taken.

GEORGE BURT GROW.

THE EFFECT OF TESTAMENTARY CONDITIONS RELATING TO LEGATEE'S MARRIAGE OR SEPARATION

The law has always protected the institution of marriage as the foundation of our civilization. It is for this reason that contracts in restraint of marriage are generally held invalid, and it is the reason for the rigidity of the divorce laws in England and in New York State. To say even this much is to state merely a truism.

In spite of the policy of the law, individuals, looking at specific examples are prone to attempt to discourage or destroy the marriage contract when it seems to affect adversely those in whom they are interested. It is for this reason that conditions in restraint of marriage are so common in wills.

The collision of the policy of the law to promote marriage with the cardinal rule of will-construction - that the aim of the court is to ascertain the intent of the testator, and allow that intent to control (Matter Hughes, 225 A.D. 29) - has resulted in uncertainty as to just how far a testator can control the marital status of his beneficiaries. Thus as late as 1918 this statement could be made: "The subject, in some of its special applications and phases, is still more confused and uncertain than perhaps any other branch of equity jurisprudence...." (2 Pomeroy 922, 4th ed.)

However, certain general statements can be made, and there is a sufficient body of law to furnish authority and decision of some sort for almost any provision that could be made. This article is an attempt to discuss those various situations.

The primary rule is that a condition in reasonable restraint of marriage is valid. The only question that must be answered is, what is reasonable? Throughout the New York cases, Jarman's statement runs like a chorus: "Conditions not to marry a Papist, or a Scotchman; not to marry any but a Jew.... have also been held good." (Jarman on Law of Wills (7th Ed.) 1497).

Certain cases will give even more of an indication of what is reasonable. Probably the leading case in New York is Hogan v. Curtin, 88 N.Y.162). In that case the court approved a condition imposed by the testator that the beneficiary, his daughter, should not marry during her minority without the consent of her mother. If the condition had required consent during her whole life, it might have been bad. (Matter Liberman, 279 N.Y.458).

In Irwin v. Irwin, (179 App. Div. 871), the court held good a condition whereby income from a trust fund was to be paid to a daughter-in-law until her re-marriage, at which time she was to be given a gift outright which equalled about twice the yearly income from the trust. The court held that this could not be held a con-

dition in restraint of marriage, and might be considered an inducement to marry. It further stated, "Alternative legacies on remarriage, balanced against prior provisions for support until remarriage, are not to be viewed as a restraint of marriage." This general statement is probably to be taken as a rule of reason, however - if the alternative legacy was so small in proportion to the provision for support as to discourage marriage, the condition might well be held to be in restraint of marriage.

A provision that a legacy should not go absolutely to a testator's daughter until a named individual died was upheld in Matter of Seaman, 218 N.Y. 77. The will also provided that in case the daughter married that person, the trust would not determine until her death. This was held to be a valid restraint. From this case, the general rule can be determined, that the testator can condition his gift on a prohibition of marriage to a certain named individual.

There is another class of cases in which the restraint of marriage is held valid. This comprises provisions leaving property to a surviving spouse to be divested if he or she remarries. There seem to be few cases and no argument on the point in New York. Matter of Martin, 130 Misc. 34, shows a variation of the rule. There the testator left his residuary estate in trust to pay the income to his widow "during her lifetime or until such time as she shall remarry." In the event of her remarriage, she was to be paid only $3,000 a year, the rest to go to charity. Mrs. Martin did remarry, but the marriage was annulled. Surrogate Foley held that she was entitled to the whole income, since the anullment made the remarriage void ab initio. The general rule is illustrated in Re Schriever's Estate, 91 Misc. 656, and Dennis v. Pettibone, 3 Alb. Law J. 150, note p. 406.

There are many cases from other jurisdictions, almost all holding to this same rule. Chancellor Wolcott, in Wilmington Trust v. Houlihan, 131 Atl. 529, 15 Del. Chanc. 84, delivers a very well-considered opinion on the subject. He states that the reason for the rule has sometimes been placed on the ground that it was though that the interests of the child justified the condition. In Lloyd v. Lloyd, 2 Sim. N. S. 255, 61 Eng. Reprint 338, the ancient common law view of women's rights shows in the statement that "the law recognized in the husband such an interest in his wife's widowhood as to make it lawful for him to restrain her from making a second marriage." The most forthright statement is by Chief Justice Gibson in Comm. v. Stauffer, 10 Pa. 350, 51 Am. Dec. 489: "It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood."

Other cases to the same point are Logan v. Hammond, 155 Ga.514. 117 S. E. 428, Glass v. Johnson, 297 Ill. 149, 130 N.E. 473, Knight v. Mahony, 152 Mass. 523, 25 N.E. 971, and 45 A.L.R. 1220, note. The restriction as to a widower was first recognized in England in Allen v. Jackson, 1 Ch. Div. 399, and similar to this is Bostwich v. Blades, 59 Md. 231, 43 Am. Rep. 548. A condition in restraint

of a second marriage is sometimes upheld and sometimes not. This condition is generally made as to daughters or daughters-in-law. It has been upheld in Iowa (Anderson v. Crawford, 202 Iowa 207, 207 N.W. 571), in Tennessee (Herd v. Catron, 37 S.W. 551, 97 Tenn. 662), and in New York, in Irwin v. Irwin, supra. Opposed to this view, and holding the condition a restraint of marriage, and void, are Indiana (Crawford v. Thompson, 91 Ind. 266, 46 Am. Rep. 598), Pennsylvania (Hoopes v. Dundas, 10 Pa. (10 Barr) 75), and Delaware (Wilmington Trust v. Houlihan, 131 Atl. 529, 15 Del. Ch. 84).

The third class of cases is perhaps the most difficult to reconcile with the general rule. This comprises those where the bequest, according to the court's determination, is to support the beneficiary during celibacy, and does not make an unlawful restraint on marriage. These are frequently called bequests on limitation, rather than on condition, although the effect seems to be very much the same. Factually, there is sometimes a difference because of the situation of the parties, but in principle there seems to be no difference. Irwin v. Irwin, supra, (179 A.D.871) can be considered as an example of this class.

A similar decision was reached in Jones v. Jones, (Law Reports, 1 Q. B. Div. 279). There, testator left his real property to Mary, Elizabeth, and Sarah, "provided that said Mary shall remain in her present state of single woman, otherwise, she is liable to lose her share immediately." Mary did lose her former status of spinsterhood, and the court declared that her estate ceased. While it based its decision partly on the difference in the rule between real property and personal property (post) it said, "still, there is strong authority, that when the will is to restrain marriage and to promote celibacy, the courts will hold such a condition to be contrary to public policy and void. But here there is no such intent. Here there was only enough to support the three living together in one household, and the provision is only for support."

A somewhat analogous situation was presented in New York in the case of Robinson v. Martin, 200 N.Y. 159. There testatrix had six daughters - the oldest married - and a feeble-minded son. She set up a trust fund to maintain a home for the unmarried daughters and the son. A trust was also set up for the son "and upon his death, I give the said share to my unmarried daughters in equal shares." Justice Gray, speaking for a divided court, said that the testatrix's intent seemed clearly to be to provide a home for her unmarried daughters and her son. There was no condition in general restraint of marriage. There is no bequest upon condition that the daughter should not marry; nor condition subsequent, the breach of which might work a forfeiture of interest. The three dissenting judges thought that the provision was in restraint of marriage, and hence, void. The fact of the dissent illustrates the difficulty of deciding that a factual situation is in the class of estates on limitation.

A Massachusetts case, Ruggles v. Jewett, 213 Mass. 167, present somewhat the same facts as Jones v. Jones, supra. There the testator left her house to her two daughters "as long as they remain single. The one marrying first, then giving up all her right and

title in the place to the unmarried sister." The court held that the words "as long as they remain single" are words of limitation, and create a life interest determinable on the marriage of each. The object of the clause is to provide for the daughters while single. The main purpose is support, not to promote celibacy. When both married, the property fell into the residuary estate.

It is perhaps safe to draw the rule from these cases that where the testator seeks to provide a home for unmarried dependents or natural objects of his bounty, and seeks to have it last only so long as they have no one else to support them - a sort of private charity - the bequest will be held an estate on limitation, and not a restraint on marriage, even though it manifestly does have the effect of a restraint on marriage.

These are probably sufficient examples of the situations where the restraints on marriage are held to be valid. It is a rule of reason, and generally common-sense will give the answer as to whether the condition is reasonable or not.

Frequently - almost generally - the restraints which the testator seeks to impose are held to be unreasonable, and void. The effect of the invalidity must be considered. Here, for historical reasons, I have chosen to divide the conditions into those preced ent and those subsequent.

At common law, if a condition precedent was invalid, the estate limited on the condition never vested (Matter Liberman, 279 N.Y. 458; Matter Haight, 51 A.D. 310). As will be shown later, the tendency of the courts was to ignore this rule, and to adopt the rule of the civil law, which held the bequest good, and the condition merely void. The reason for this is considered in an article by Roscoe Pound in 3 Ill. Law Review 1, which article is worthy of of a brief digest herein:

In Roman Law, the entire estate was left to a testamentary heir. One of the reasons for this was to perpetuate the sacra. Because of the overwhelming necessity for their being an heir, the law treated an illegal or impossible condition as not written, for otherwise, there would have been no heir. This was criticized on principle by some of the Roman lawyers, but was accepted by the Sabinians (although Gaius, a Sabinian, confesses that there is no good reason for the different rule as to legacies), and adopted by Justinian, whence it passed into the civil law. Thus originally, the rule was adopted for reasons of expediency. From Justinian, it descended to the law of the Middle Ages until the various codes arose. At first adopted in some, it has now been rejected in the German Code and the Austrian Code. It has been adopted in the French code, and harshly criticized by French jurists. The rule was rejected when the Indian Civil Law was drawn up by English lawyers, and the same rule applied to legacies as to all illegal conditions precedent.

In England, according to Pound, it was adopted with reluctance (see Wren v. Bradley, post, and the provisions as to limitations -

which limitation on the doctrine was not known to the civil law. He further states that there are few American cases in point (citing Matter Haight, post, and Cooper v. Remsen, post), and concludes that the question is still open, and that there is no reason for the Roman-Civil Law Rule, and that the same rule should apply to testamentary provisions as to any other - that when void, the bequest also fails.

While it may seem presumptuous to disagree with Mr. Pound, on the authority of many cases, the majority of which have been decided since he wrote the article, I feel that the rule is well established in New York State at least, whether that is desirable or not. This last question can perhaps be answered after examination of the cases.

It should be noted that the courts are unwilling, at times, to say whether a condition is precedent or subsequent. In some cases, they say the same rule applies, regardless. And in some cases they deliberately twist a condition precedent into a condition subsequent, so as to avoid at the outset an application of the common-law rule.

However, I have classified the cases as the condition appears to me.

The earliest case on the subject which I have found is Tennant v. Braie, 21 Eng. Reprint 128, Tothill 77, decided about 1600. The entire opinion is "A devise made to the daughter to pay her a sum of money if she will be divorced from her husband, the gift made good, though the condition void." The case is frequently cited, and seems to be the English foundation of the rule that the condition alone is held as though not written, and the bequest is good.

Brown v. Peck, 28 Eng. Reprint 637, 1 Eden 140: testator provided that if his niece lived with her husband, his executors should pay her £2 a month, but if she lived from him, and with her mother, then they should allow her £5 a month. The court decided that the niece should receive £5, that the condition being impossible at the time of imposing it (since the common law felt that the wife was necessarily with her husband), and contra bonos mores, the legacy was simple and pure.

Wren v. Bradley, 64 Eng. Reprint 23, 2 DeG. & S. 49: Testator left certain bequests to his married daughter, to cease and determine if at any time she lived with her husband. At the date of the will, the husband and wife were separated, but before the testator's death they had become reconciled. The court stated that "in the absence of authority, I would probably decide this against the wife. But the authority seems to be in favor of her taking the bequest." It is this case which Pound cites as proof that the English courts applied the doctrine of the civil law reluctantly.

This is perhaps enough of the English cases, although there are many more, all very much to the same point.

Testator apparently drew his own will in Bayeux v. Bayeux, 8 Paige Chancery 233, and did a very bad job of it. One of the provisions was that if any of his children married without their parents' consent, they should be cut off from any bequest in the will. Chancellor Walworth held that the whole will was ineffectual because of uncertainty, except for the appointment of an executor. In passing, he stated "Even that power (to take from the children for marrying without consent) is not given in such a way that it can be effectually exercised; as the mother is not authorized to appoint the property to others in such a case. And a power to keep the property herself, by withholding her assent to the marriage of her child, would probably be invalid, and inconsistent with the principles of public policy, as it might operate as an inducement to her to withhold her consent to a proper marriage." This is pure dictum, and recognized as such, but it is the authority for several cases in New York.

O'Brien v. Barkley, 60 N. Y. St. Rep. 520, 78 Hun 609: the plaintiff married O'Brien, and separated, after which the testator, plaintiff's father, made his will, The plaintiff and her husband were still separated at testator's death. The entire estate, both real and personal, was left in trust to pay the net annual income to plaintiff, "provided, however, and on the express condition that she do not, at any time after my decease, associate, cohabit, or live with her husband. If at any time she does, the trust is to determine and be divided among other relatives." But if her husband dies or otherwise lawfully ceases to be plaintiff's husband, and she shall not have lived with him, then all the trust property is to be turned over to plaintiff. The court held that the estate vests at once, subject to being divested, therefore it is a condition subsequent. Since the condition is unlawful, and the trust is intended wholly to perpetuate the unlawful scheme, the trust fails. The daughter has a life estate, and since there is no remainder over, and she is the only heir, she has the whole estate, in fee simple absolute.

I cite this case, here, in spite of the fact that it is a condition subsequent, because of the following statement (which is apparent dictum), "The courts have held in some cases, respecting legacies - and I find no reported case holding to the contrary - that even where the condition is precedent, and void as against public policy, the legatee takes the legacy free and pure notwithstanding, and in all cases of realty the devisee takes where the condition is subsequent." Thus it appears that lip-service, at least, is still paid to the distinction between personalty and realty.

Potter v. McAlpine, 3 Demarest 108, although merely a surrogate's opinion, is frequently cited. There the testator left a very large estate, both real and personal, in trust. He directed payment of $1,000 a year out of income to his son Charles, the rest to be accumulated during Charles' children's minority "or until Charles shall not live with, or at any time contribute in any manner to the support of his present wife Jennie, if he does not live with or at any time contribute to her support, pay to him his full share." It is probably unnecessary to add that the testator was somewhat

irascible, and didn't like Jennie, for reasons not at all her fault. Surrogate Adlington held that the condition was illegal and void, since it required a violation of the statutes of the State requiring a husband to support his wife, and was contrary to public policy. The condition is precedent, and while at common law would work a forfeiture of the gift, yet in Equity and under the civil law, though the condition is void, the gift is good. (Citing 2 Jarman on Wills, 5th Am. Ed. 12, and 1 Roper on Legacies 757 - which make their first bow in New York cases, to reappear in later ones). Tenant v. Braies (supra), Brown v. Peck (supra), and Conrad v. Levy, (post) are also cited and approved.

The case most frequently cited in subsequent cases is Matter of Haight, 51 A.D. 310. It is also criticized by Pound in his article (supra) and passed off as merely the opinion of an intermediate court. So it is, but it has had a long line of descendants, and the rule it lays down has never been criticized in New York.

In this case, the testator left his estate of real and personal property in trust to pay the income to his son Benjamin "but it is my will that so long as the present wife of my said son shall be living and he shall be lawfully bound to her as a husband, the income to be paid my son shall not exceed $2,000 a year, and in case of her death, or in case of his ceasing to be bound to her as a lawful husband, then the whole of said income is to be paid over to my said son." This will was made two days after his son was married. Benjamin claims the provisions limiting the amount is void by public policy. Justice Hirschberg held that the precise and probably intended effect of the provision, is to induce the son to get a divorce. This is against public policy in New York (Wright v. Mayer, 47 A.D. 604). "If the condition is void, it follows that Benjamin is entitled to the entire income. This is so whether the condition be regarded as precedent or subsequent. With respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving malum prohibitum, the bequest is absolute, just as if the condition had been subsequent." (Jarman, supra). "Where the illegality of the conditions does not concern anything malum in se, but is merely against a rule or the policy of the law, the condition only is void, and the bequest single and good." (Roper, supra).

Robinson v. Martin has been considered supra. Here the dissenting judges felt, with considerable justification, it seems to me, that this was a restraint on marriage, and hence invalid.

The most recent case on the subject in New York is Matter of Liberman, 279 N.Y. 458. Here the testator divided his residuary estate in six shares. Two were given to one son outright. Two were reserved for his son Harry, under certain conditions. The income from one share was to go to Harry for life, and at his death vest in his children if he married with the consent of testator's wife and executors, but if he did not marry with consent, or if he had no children of a marriage contracted with consent, it should

vest in testator's other children or their issue. These other children were the executors. As to the other share, the income was to go to the other children until Harry married with consent, in which case the income was to go to Harry and his issue as provided for the other share.

The court decided first that the condition was against public policy because the condition was to last during Harry's whole life and because the executors would benefit by refusal to give consent. The court refused to go any further, saying that perhaps the necessity for consent alone would not be unreasonable (thus casting some doubts on Hogan v. Curtin, supra) and that perhaps the fact that the executors would benefit would not under all circumstances be unreasonable.

Having decided that the condition is void, the Court cites with approval Matter of Haight supra, and the texts mentioned therein, and states that this rule is in accord with the weight of authority citing Potter v. McAlpine, supra, O'Brien v. Barkley, supra, and Bayeux v. Bayeux, supra. This further statement is made, "The tendency of the courts has been to ignore distinctions between legacies out of personal estate and legacies or devises of interest in real property, and to apply the rule of the civil law to conditions precedent and even to conditions creating a limitation upon a precedent estate with respect to all legacies or devises. The beneficiary takes under the will as if no conditions had been annexed to the gift to him or as if he had complied with the void condition."

Recognizing that this decision may not be in accord with common law principles, the court says that "it is rooted in considerations of practical expediency or necessity rather than logic. To hold the condition void without at the same time giving effect to the gift made upon the void condition, would be a mockery of the beneficiary and by indirection would permit a testator to accomplish a result which we hold contrary to the 'common weal'."

This seems to fix the New York view. This case is the first to reach the Court of Appeals, but as I have indicated, the rule is well established, at least by dictum, in the lower courts.

New York is not alone in this determination. In Conrad v. Lev 33 Mich. 78, testator's will provided "to my brother, I give the one-half so remaining, and the other half I give and bequeath to my sister Elizabeth, upon this condition: If at any time subsequen she should conclude not to live with her present husband, Henry. Bu if she continues so to live as the wife of the said Henry until her death, then in that case I give all my property to my brother." Th court said that the condition is admittedly void. "But we find nothing in the nature of a condition precedent. The language is very blind, but it shows that the devise over to the brother was to depend on whether Elizabeth continued to live with her husband." "We think she took an estate clear of conditions. So far as the case presents any question concerning the ambiguity of the condition or its precise meaning, we need not discuss them, for no interpretation would change the general quality of the condition as contrary to public policy, and the will must speak for itself as to

its being a precedent or subsequent condition." It may be the "language of the will is very blind." The court is more so. A gift to take effect when Elizabeth leaves her husband can be nothing but a condition precedent, even though she has her whole life to leave him. The authority of the case for a holding that when a condition precedent is void as a restraint of marriage, the gift is good, is, of course, weakened by the fact that the court calls the condition subsequent.

Nebraska has come to the same determination in Hauke v. Euryar 46 N.W. 422, but here the condition is clearly precedent. Following Conrad v. Levy, Brown v. Peck, and Tennant v. Braies, it held a provision void as a restraint on marriage, but the bequest operativ as though the condition had not been sought to be made by the will. The will provided that a fund should be kept in trust for ten years. At the end of ten years "if my son William shall have become permanently reformed of his intermperate habits, the fund shall be set over to him, provided further, that the fund shall not be transferred until my trustees have proof that my son has permanently freed himself from all relations with Sadie Gladstone." Before the re-publication of the will by a codicil, William had married Sadie. Thus, while the condition as to intemperance was good, the condition requiring him to get rid of Sadie was bad.

Some states hold that a condition in effect requiring a legate to divorce his wife is not against public policy, and hence such a condition is valid. (Cowley v. Twombley, 173 Mass. 393; Daboll v. Moon, 88 Conn. 387).

I have found three cases holding the bequest ineffective when the condition is invalid. The first of these is Cooper v. Remsen, 3 John. Chanc. 382. The testator left his daughter $1,000 a year, during her separation from her husband. When the will was made, the husband and wife were separated. They later lived together, and separated immediately after the testator's death, but were living together when the action was brought. Chancellor Kent refused a recovery, saying, "The inference is that the plaintiffs separated for the sole purpose of entitling themselves to the legacy. Such an act cannot receive countenance. It was immoral, and yet the plaintiffs come here to calumniate the memory of their father, by charging him with making a provision for illegal and immoral purposes, and that it was intended to seduce the plaintiffs to violate their matrimonial engagement. But I think the provision may receive a better construction. If the parties lived apart when he made the will, the provisions may have been humanely intended to provide a suitable maintenance for a deserted child."

This case is followed in Wright v. Mayer, 47 A. D. 605, where the testatrix left her property to her daughter, who was then separated from her husband, but if she returned to her husband, title would become vested in testatrix's executors, to pay the income to the daughter for life, and at her death, to pay it over to her children. The court there said that the condition does not put a premium on separation. It is a valid provision to insure tha the husband had no control over the property, and that it go to the testatrix's grandchildren.

In Matter of Hughes, 225 A. D. 29, aff'd 251 N.Y. 529, the testator provided "If said Martha should go back to live with her husband, from whom she is separated, she is not to receive any of my property, but the same shall belong to the children of my nephew." In fact, Martha had returned to her husband before the testator died. Justice Edgcomb, speaking for the Fourth Department, said, "it is just as logical to assume that this bequest was to support Martha while separated, as to assume that it was unlawful to attempt to keep them apart." He ruled that the condition was valid, since it was made when the parties were separated, and decide that the estate never vested, and the children of the nephew took the bequest.

These cases show that the rule is not settled that where there is a condition precedent, void because it is in restraint of marriage, the gift is good and the condition bad.

There are many cases in New York where it was held that a void condition subsequent was of no effect, and the gift remained in the legatee. (Whiton v. Snyder, 27 N.Y.St. Rep. 641; Matter of Anonymous 80 Misc. 10; Cruger v. Phelps, 21 Misc. 252; Merriam v. Wolcott, 61 Howard's Practice 377; Matter Forte, 149 Misc. 327.)

The text writers at the present time are against the Civil Law rule, but generally do not come to any determination as to the American viewpoint on the subject.

"The peculiar doctrine, adopted by the English courts from the civil law, by which, in some cases, an illegal or impossible condition precedent to a legacy of personalty is merely ignored, the donee taking as if such condition had not been inserted, appears never to have been applied in connection with devises of realty." (1 Tiffany on Real Property 276, note). This statement is not wholly true. The early New York cases in dictum do apply it to both real and personal property. (Bayeux v. Bayeux, O'Brien v. Barkley, and Potter v. McAlpine, supra, it appears, necessarily applied to real property).

"If an illegal or void condition is precedent, the estate can not vest." (2 Alexander on Wills 1497). Alexander then mentions the English rule under discussion here, but makes no comment on its application in the United States.

The Restatement of Property (Tentative Draft No. 9, comment f, p. 201) states, as to impossibility of performance: "An early line of English cases differentiated between conveyances of personalty and conveyances of land and followed the Civil Law rule as to conveyances of personalty, thus holding that as to such conveyances, when a condition precedent was impossible ab initio, the gift was nonetheless valid. This doctrine has received dictum recognition in Illinois and in the United States Supreme Court. In dispositions involving personalty the gift has been held ineffective where the condition precedent was originally impossible, in Alabama and Mississippi. These decisions are inconsistent with the English rule. The concensus of opinion among American text writers is adverse to the acceptance of the Civil Law rule, and favors its rejection. This is the position taken in this comment."

"If the subject-matter of the gift be realty, and a condition precedent is impossible or illegal, the condition is void and the gift also is void. In the case of bequests of personalty, however, a different rule appears to be in force, at least in the English courts... It is said that this rule is derived from the Roman law, but no very satisfactory reason has been given for retaining it. The American cases which have considered the question are too few to justify any statement of the rule in this country. (Holding it invalid: Carter's Heirs v. Carter's Administrators, 39 Ala. 579; Lusk v. Lewis, 32 Miss. 297; and see Cooper v. Clason, - considered in Cooper v. Remsen, supra. Upholding the bequest as in English cases, Dwyer v. Kuchler, 174 Atl. 154, 116 N.J.Eq. 426; In re Haight's Will, supra; and see Potter v. McAlpine, supra, Hauke v. Luyart, supra, and Dusbiber v. Melville, 146 N.W. 208, 178 Mich. 601, 51 L.R.A.N.S. 367.)" - 2 Simes on Future Interests §611. And see also 3 Simes 748, relating to impossible conditions precedent.

Probably the first impression is that where the condition precedent is a void restraint on marriage, the gift should be held good. The natural feeling is that the testator, at least in most cases, if he knew he couldn't legally make such a condition, would prefer to have the legatee take the bequest free from the condition rather than not take it at all. The other side is expressed in Mr. Pound's article: "Why should we try to save such fragments as we may when the scheme the testator deliberately chose has failed; why should we strive to carry out his presumed intentions cy pres unless we lean toward testacy?" "The reception of the rule by the civilians and the reception of it by the English Court of Chancery must be laid to that 'officious kindness' characteristic of the formativ period of equity in both systems, which tries to make men's dispositions over for them and to enforce for them what the praetor or chancellor thinks they would have liked to do. Matured law is averse to such judicial willmaking." I think the answer to the first statement is implied in the question - we do lean toward testacy. The second statement is more serious. Sustaining the bequest and avoiding the condition is justifiably called "officious kindness" since there is no way to tell what the testator did actually want.

Why should there be a different rule where the invalid condition precedent is in restraint of marriage, from the general rule as to invalid conditions precedent? This is probably the gravest criticism of all. The historical reason for such a holding is no longer applicable, and to make such an exception is to add one more complexity to a law already sufficiently complex. As long as we have the general rule as to illegal conditions precedent, which, incidentally, has been modified by statute in some states, there seems no good reason for changing it merely because the condition relates to marriage.

Whatever the answer should be, the New York rule seems determined by the Liberman case. The opinion is not as clear as it might be. It makes broad generalizations, and then limits the decision to the facts of the case. But in spite of the equivocations of the opinion, I think it definitely adopts the Civil Law rule in New York.

RICHARD BELL CONGDON

RES JUDICATA IN TAX CERTIORARI PROCEEDINGS

Local government derives its principal source of revenue from taxation of real property. Unfortunately, for the owner of real property, we have not, as yet, evolved a just method of ascertaining his fair share of this burden. The amount of tax which a property-owner must pay, is largely dependent upon the judgment of one man, the assessor. If all assessors were absolutely fair, unbiased, experts in the real property field, there would be no ground for complaint, for everyone must admit that there is no perfect system of taxation. However, in practice, we generally find a very different type of incumbent in the office of assessor. He is usually a biased political satellite, ready to bow to the dictates of the "boss" by whose favor he holds his position, and this is so whether he be appointed or elected.

At present, we are in an era of constructive reform. Even the so-called necessary evils have been carefully scrutinized and their right to exist questioned. Many Americans are proclaiming that Lincoln's cry to fight "for a government of the people, by the people, and for the people" is being answered and that its realization is near. But this exuberance is poor solace for those who are now suffering under the yoke of unfair and unconscionable taxation.

Curiously enough, in contrast to the general trend of reform, we find the status quo preserved intact in the taxation field. Very little constructive legislation has been even proposed to remedy an evil which is so clearly manifest by a glance through the local assessment rolls. It is no uncommon occurence to find two practically identical pieces of property adjoining one another to be assessed at vastly different values. The law, at present, instead of condemning, in effect fosters and encourages these inequalities. In the name of emergency legislation, a bill was introduced in the 1938 Legislature to prohibit during the emergency period, any court from making an order directing the reassessment of property or the correction of erroneous assessment on account of overvaluation. There have been other legislative proposals to limit the right of a taxpayer to seek redress. Before giving the local governments further rights, the Legislature should demand that they put their house in order.

Destructive attacks on particular individuals will avail us nothing, for human nature cannot resist when lucrative opportunities tantalize those empowered with bureaucratic authority or when spite and hatred may so easily be gratified by the mere raising or lowering of assessed valuation. This is especially so when one can so easily justify his acts by finding sanction in a system so long established. "To the victor belongs the spoils" was openly acclaimed by Andrew Jackson, and today we find the spoils system firmly intrenched in our national, state, and more particularly, in our local government. Its proponents argue that there is no real evil in it because there are just as many competent Republicans to fill offices as there are Democrats, and that the people generally do not suffer much by it. In respect to the distribution

of patronage and the like, I do not question their contention; but I do say it is a sorry state of affairs to leave the question of how much taxes one must pay, to be determined by which political party wins an election. That is precisely the state of affairs in many instances today.

Under our present law, what relief is open to one who feels himself aggrieved, and how effective is the relief? His only remedy is to protest on grievance day and to appeal from an adverse determination by certiorari proceedings. The case of People ex rel Hilton v. Fahrenkoff, 279 N.Y. 49, decided November, 1939, shows us how effective the relief is.

There, two parcels of real property, situated in the City of Albany, were assessed in 1936 at $800,000 and $25,000 by the Commissioner of Assessment. The City Board of Review, composed of the Commissioner who assessed the property, the Comptroller, and the Corporation Counsel (all political appointees) refused any reduction This Certiorari proceeding was brought at Special Term and the Referee, after a trial of the issue of Value, reduced the assessment to $704,000 and $15,048 respectively. The prior assessment of each property in 1935 had been reviewed by Certiorari and the value found to be $489,324, and $14,960. The Special Term in this case confirmed the Referee's report but the Appellate Division reversed and sustained the relator's contention that the 1935 decision was res judicata as to the issues of value and reduced the assessments to $489,324 and $14,960. The Court of Appeals held: "This view involves a misconception of the scope of res judicata which shound now be removed. It is the essence of an assessment that it fixes value as of a certain time. Each annual proceeding is separate and distinct from each other. Year by year an assessor must use his own judgment and must verify the roll. From their considerations it results that a prior judicial determination of value does not legall bind successor accessors. While the case of People ex rel Eckerson v. Lundel, (157 N.Y. 513) suggested that a different result might consistently be predicated of the circumstance that no change in the personnel of an assessing board had occurred since a prior adjudication of value was made. We are now persuaded to say this suggestion is unsound, for value in one year is not in issue thereafter, nor are the assessors themselves the real party in interest. Accordingly, we conclude (though the assessing officers have at all times been the same persons) the doctrine of res judicata can have no true application to the issue of value in recurring assessment proceedings. New findings of value were here made by the Appellate Division. These have been reviewed. It is our judgment that the findings of value made by the Special Term are in accord with the weight of the evidence."

This case overrules in part what many thought was the law. People v. State Tax Comm.(1932) 42 St. Dept. 284, held unless there is a change in jurisdiction, a substantial change in the subject matter of the tax, or lack of privity of interest in the parties, the principal of res judicata should be applied. People ex rel Norwich Pharmacal Co. v. Porter, (1930) 228 App. Div. 54, held: The adjudication of the prior year is res judicata unless the value of the property has been increased or decreased or there has been some other change affecting the assessed value. However, if there

is not an identity of parties and subject matter, that is, if the personnel of the board of assessors has changed or if there is a variance in assessed values generally in the tax district or in the condition of the relator's property, the decision is not res judicata. The former adjudication is admissible in evidence and the burden is on the party alleging res judicata to prove it. In this same case, as reported in 132 Misc. 609, the Supreme Court Judge in his opinion stated "Changes necessarily occur in the condition and valuation of various pieces of property in a tax district from year to year and it is hardly conceivable that the figures in any one year would be identical with those of any other year as to the entire assessment roll, the burden of showing res judicata is not sustained."

With the law in its present state, it is no wonder that assessment of property has become a racket. What protection has the lower middle class who own small homes and who cannot afford the expense of one certiorari appeal, let alone one every year, If his taxes are $250.00 a year instead of $150.00 as they should rightfully be, all he can do is pay and at the next election vote the other political ticket which may or may not give him relief. It is true he has a right to sue but the cost of lawyer's fees and other expenses are so high and the relief so temporary that he must give up in despair. The lawyer's fees are necessarily high because to successfully litigate such a suit, he must labor extensively to prove his case. The rules of evidence in certiorari proceedings are all in favor of sustaining the assessor's determination. For example, it is not suffucient evidence of inequality to show that several particular pieces of property in the same vicinity are assessed at a value disproportionate to the one in suit. He must show that the assessment is out of proportion as compared with valuations generally on the same roll or there is no relief. This entails a great deal of work which lawyers will not do for a small fee, as we all know. There are several other rules of evidence of like effect which I will not go into here.

Mr. Hilton, who had enough at stake to warrant continuous appeals to the Court, is deprived of justice in some degree, but it is legalized extortion in respect to the many white-collared and factory employees who are striving hard to keep their heavily mortgaged homes.

Lest my position be misconstrued, I repeat that I do not blame political bosses nor politicians in general for this state of affairs, for they are merely playing the rules of the game which will work adversely to them when they become members of the minority party. But the real vice is in the system which is aided and fostered by the law.

The law students should make it their duty to strife to correct abuses when they see them and I urge you to write a letter to the Legislature asking the passage of a bill which Senator Wicks has introduced in the New York State Senate, Print No. 107, it provides: "If upon the hearing (Certiorari), any party shall offer in evidence a final order of the Supreme Court fixing the assessed valuation of the same real property for the previous year, the Court

shall fix the assessment at the same amount as that fixed by said previous final order, unless it shall be made to appear affirmatively that a change has occurred in the value of such property between July 1 of the year reviewed in said previous final order and July 1 of the year currently being reviewed. If it shall be made to appear that the said real property has been improved during such period, the Court shall fix the assessment at the amount fixed by said previous final order plus the value of such improvement. If it shall be made to appear that the value of said real property has been impaired during such period, the Court shall fix the assessment at the amount fixed by said previous order less the value of such impairment. The burden of establishing such changes shall be upon the party claiming the same. The provisions of this section shall not be affected by a change of any party or parties in such proceedings." This bill is a step in the right direction but as I interpret it, the bill does not go far enough. It applies only where the party seeking redress has "a final order of the Supreme Court fixing the assessed value of the same property for the previou year." I would urge that it be amended to include judgments obtained four or five years previous, or even longer, because it is almost as bad to require the realtor to prove his entire case every second year as it is every year. In the Hilton case it took almost two years before the case reached the Court of Appeals and was finally determined.

In an assessment case in the city of Troy on the M. Nirenberg Sons, Inc. Collar factory, former Supreme Court Justice Staley, sitting as Referee, filed his decision in the Rensselaer County Clerk's office a few weeks ago. The property was assessed at $130,000. Justice Staley held that "the property is overvalued to the extent of $30,000 and that property generally in Troy is assessed at 85% of its full value" and accordingly made a reduction of $45,000. "This is the third consecutive year that the assessment on this property has been reduced $45,000," judgments having been obtained as to 1937 and 1938 taxes. In connection with his report he filed an opinion in which he indicated that not only were the adjudications in previous proceedings competent evidence, but that they are entitled to great weight, particularly in view of the fact that the city could not show that there has been any increase in the value of the premises in the interval. Justice Staley also made reference as to the character of the consideration which the Commissioner of Assessment and Taxation should give to protests against assessments that are filed by taxpayers. I do not know whether this report will stand on appeal in view of the declarations in the Hilton case that "year by year an assessor must use his own judgment" and "Each annual proceeding is separate and distinct from the other." However, the Court of Appeals could sustain it without overruling the Hilton case, because there they were speaking of res judicata - not the weight of evidence.

Even if this is the proper method of weighing the evidence, it does not help much the unfortunate position in which many real property owners find themselves today.

Charles Tobin, in his Taxation notes states: "The defects of our present system of real property taxation are so various as to defy enumeration. Definitions of terms are inexact and unreason-

able and do not conform to judicial interpretations. The machinery by which assessments are made is antiquated, inadequate, and provided in sections that are often obsolete and consequently, the assessments are very often inequitable and unfair. The cost of assessment, collection, and sale of real property is under existing conditions much too large. It is occasioned by overlapping tax units, and the lack of uniformity in regulations and administrative detail among the various units. There were, in 1932, some 12,400 taxing units in the State. Fiscal, calendar, and school years variously govern their tax programs and each district prepares its own tax roll, collects and spends its own levy. There is no uniform date of assessment. Frequently, we find triple or quadruple overlapping of districts, tax machinery, and the expenses of their maintenance, in a single tax district of the State. The only way in which this ridiculous situation can be adequately corrected is by Constitutional Amendments permitting the consolidation of tax districts and the combination of local offices."

The last Constitutional Convention answered the people's cry for relief by drafting the following amendment which was adopted by the people. It is Article XVI §2 of the New Constitution. It provides: "The Legislature shall provide for the supervision, review and equalization of assessments, for purposes of taxation. Assessments shall in no case exceed full value.

"Nothing in this Constitution shall be deemed to prevent the Legislature from providing for the assessment, levy and collection of village taxes by the taxing authorities of those subdivisions of the State in which the land comprising the respective villages are located, nor from providing that the respective counties of the State may loan or advance to any village located in whole or in part within such county the amount of any such tax which shall have been levied for village purposes upon any lands located within such county and remaining unpaid."

This Amendment drafted by the Republican Constitutional Convention shows on its face party politics, and seems to provide differently for rural communities and for the rest of the State. It directs the Legislature to provide for a system of equalized assessment, but at the same time it goes out of the way to reserve to the Legislature the power to exclude from the operation of any uniform system, the villages, which are mostly Republican strongholds. In other words, it indicates to me that the drafters of the Amendment wanted these unfair assessment practices to continue in places where the Republicans were in power.

With my limited knowledge on this subject, I cannot suggest a new system that would work effectively, but surely there must be some better method of assessing property than exists at present. There has been a method suggested, namely to tax land by front footage, and the building by the income it produces. Senator Garrity proposed that a referee be appointed for a term of four years to hear arguments and proofs, and to grant or deny wholly or in part the reduction asked, and his bill further permits a party to prove his willingness and effort to sell his property at the price t which he claims the assessment should be reduced, for a period of three months prior to his protest. If the referee is satisfied

with such proof, he must reduce the assessment to that figure; if he is unsatisfied, he may with the taxpayer's consent, place the property in the hands of the broker for sale for a further period of three months, after which the assessment must be reduced to the asking price if the property is still unsold. I am not in accord with this unique method, but I do say there is plenty of opportunity for constructive legislation in this field and the Legislature should awaken to the taxpayers' cry for relief.

EMIL STANISLAUS BARTLE

MOVIE CENSORSHIP

In recent years the State of New York has attempted to make certain that the pictures shown in the theatres throughout the State are of a proper subject matter. "The director of the Moving Picture Division is required to issue a license for a film submitted for review unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such character that its exhibition would tend to corrupt morals or to incite to crime." (Article 43 §1082 of the Education Law.)

Before a picture may be presented in any theatre, the State has required its submission to the Moving Picture Division for approval. The Director of the Division or one authorized by him must have a review of the picture and either issue or refuse a license to the applicant. The officer reviewing the picture must make a determination and render a decision thereon.

If the applicant feels that the determination is unfair, unreasonable, or capricious, the Legislature has prepared a way by which an appeal may be taken. "An applicant for a license or permit, in case his application be denied by the Director of the division, or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the Commissioner of Education, the deputy Commissioner of Education, or an assistant Commissioner of Education. A determination upon such review refusing a license shall be reviewable by certiorari at the insistence of the applicant." (Article 43 §1084 of the Education Law.)

As a result of the attempt of the State to censor pictures, various questions have arisen. For example, a certiorari had been granted out of the Supreme Court commanding James Byrne and others, constituting the Regents of the University of the State of New York, to certify and return all the proceedings had and determinations made in denying Arthur Mayer and Joseph Burstyn's application for a license to exhibit the motion picture "Remous" "Whirlpool"). It was heard and reviewed under Article 78 of the Civil Practice Act, and §1084 of the Education Law, by the Appellate Division. (In the Matter of Mayer v. James Byrne and others, 256 App. Div. 431). The above Committee had and affirmed a rejection of a license for the picture by the Director of the Motion Picture Division of the Department of Education.

The petitioners say that the picture portrays the effect on the lives of a young married couple, of an accident which cripples the husband, and shows the drift of the young wife to the society of a normal and physically fit person; her attraction to an athleti young man, her resistance, the incidents for which she was not responsible which brought about the clandestine affair, her realization of the wrongfulness of the situation and finally the determination of the wife to revere and respect the memory of the man who sacrifices his life in the thought that this would further the happiness of the wife he loved.

The Motion Picture Director says of the story, "Impotency of the husband and its effect upon the sex life of the wife, resulting in her adultery and the husband's suicide is not regarded as a decent theme for screen portrayal. Sex, the urge for sexual intercourse and the results that followed the breaking off of intercourse when the man became impotent form the basis of the picture."

The court reviewed the picture and found that it is open to the construction placed upon it by the Director of the Motion Picture Division, and that the finding that "Remous" is immoral and would tend to corrupt morals is not arbitrary. The court confirmed the determination and refused to direct the respondents to issue a license.

In his concurring opinion Judge Hill says, "The Motion Picture Division of the Department of Education has been entrusted by the Legislature to deal with these specialties and as long as they act in accordance with due administration of law by affording a hearing, taking evidence, and giving their judgment, we cannot interfere with their conclusion."

In the Matter of Foy Productions, Ltd. v. Graves, 253 A.D. 475 the Court in rendering its decision stated, "The Commissioner is constituted the fact-finding agency under the Statute and has been entrusted by the Legislature with the duty of determining whether or not a picture is immoral, tends to corrupt morals or to incite to crime. If there is evidence to constitute a reasonable basis for the determination of the Commissioner, if his determination is not arbitrary nor capricious, if the verdict of a jury reaching the same conclusion would not be set aside as against the weight of the evidence, the court is not at liberty to disturb his findings."

Unless the decision is not amply supported by the facts, the court will not reverse a decision of the Moving Picture Division. If there is sufficient evidence to sustain the determination of the officer who reviewed the picture, the court will not make a new determination but affirm that of the officer, or the Regents of the University of the State of New York, as the case may be.

In the Matter of Eureka Productions, Inc. v Byrne, 252 App. Div 355, the petitioners claimed that refusal to grant a license constituted an unlawful interference with foreign commerce since the film "Ecstasy" was imported from Czecho Slovakia. The picture had been reviewed by the United States Customs officials and they permitted its entry.

Prior to this review the petitioners had brought an action in the Federal Court for an injunction restraining the respondents from interfering with the exhibition of the picture. The Federal Court in denying the injunction said that the State was acting under a valid exercise of the police power. The Appellate Division referred to this case and overruled the petitioners' contention on the same ground.

The police power is the power to promote public welfare, prosperity, convenience, morals, health, and safety. The police

power is exercised by a state as an attribute of its sovereignty. Liberty may be interfered with, under the guise of police power, by legislative action which is not arbitrary, and if there is a reasonable relation to some purpose within the competency of the state to protect. It can not be denied that the state is interested in protecting the morals of its citizens.

In The Eureka Production Inc. v. Lehman, 17 Fed. Supp. 259, the court held, "Censorship by statutory regulation in the State of New York constitutes no burden upon foreign commerce. It is intended merely to regulate their local use. In regulating the local exhibition of films, the State exercises its police power after the article has lost its character as an import and consequently does not invalidly interfere or conflict with the exercise of the Federal Power."

"Congress did not seek to supersede the police power of the state in regulating the admission of films from foreign countries, and the judgment of the Federal officers in admitting the film did not prevent the State officer from arriving at a different judgment when it came to the exhibition of the film and the granting of a license therefor."

The question as to interstate commerce has also been settled by the courts. In Mutual Films, Inc. v. Industrial Commission, 236 U.S. 230, the court held, "It would be straining the doctrine of original packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or being ready for renting for exhibition within the state, could not be disclosed to the state officers. When the films are in the hand of the exchangers, ready to be rented to exhibitors, or have passed to the latter, they are in consumption, and mingled, as much as from their nature they can be, with other property of the state."

In the above mentioned case the court answered the question, whether censorship of movies was not an infringement of the freedom of the press and freedom of speech. The court stated that "the argument is wrong or strained which extends the guarantees of free opinion and speech to the multitudinous shows which are advertised on billboards of our cities and towns, and which regards them as emblems of public safety, and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion."

The petitioners have also claimed that it is denying them of property without due process of law. There is a property right in being able to exhibit the picture throughout the State, but "If the statute is a legitimate exercise of the police power, it is not inconsistent with the Fourteenth Amendment because the Amendment was not designed to interfere with the exercise of the police power. Whether the use of a police power is necessary is a question of fact and of public policy, which is for the Legislature to decide. Their decision is conclusive unless it appears on the face or from the facts of which we must take judicial notice that the statute infringes on constitutional rights."

Several pictures submitted for review are argued on the ground that the purpose is to enlighten the people on the "facts of life" so that they would not be in the dark on certain matters about which they should be well informed. However, a motion picture is neither a book, a newspaper, nor literature, but a "spectacle or show rather than a medium of opinion, and the latter quality is a mere incident to the former." The primary purpose of the theatre is as a form of entertainment, a period of relaxation.

Films may be used for evil and against that possibility the statute was enacted. "Their power of amusement, and, it may be, education, the audience they assemble, not of women alone, nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from a worthy purpose."

In The Genesee Recreation Co. v. Edgeton, 172 App. Div. 464, the Appellate Division states, "Even though the picture inculcates such a lesson it does not necessarily follow that the exhibition may not offend against public decency. However desirable it may be to disseminate such knowledge, it may well be doubted that it should be done by means of a picture show in a public playhouse."

In the matter of the Foy Production, Ltd., the determination was that "the reproductive organs are the theme and their perversion is the topic of the picture, 'Tomorrow's Children', and without reference thereto the picture would have neither plot nor substance. Practically every announcement and speaking part heard and every action exhibited interpret and elucidate sterilization as a means and method of contraception and birth control, or tends to that end.

"The Law of New York prohibits the dissemination of any written advertisement, circular or notice of any kind of a recipe to prevent conception and prescribes that who does offend is guilty of a crime. A public presentation of the picture, 'Tomorrow's Children', is a clear violation of that provision.

"Teaching and demonstration of many facts may be necessary to the classroom of the law school, the medical school, and the clinic, the research laboratory, the doctor's office and even the theological school, which are not proper subject matter for the screen."

HARRY ROBERT ROSENBLUM

N O T E S

STEITZ v. GIFFORD.- The rule as to profits as an item of damage in an action for personal injury injuries has been somewhat extended in the recent case of Steitz v. Gifford, 280 N.Y. 15. In this case, the plaintiff, a farmer, was injured in an automobile accident. Liability was admitted, and the only question submitted to the jury was the question of damages.

The plaintiff showed that he had 400 acres of sweet corn, planted so as to mature at different times. The corn on 80 acres, on which tere were 800,000 ears, was ready for market during the week of August 15th. Plaintiff showed that he had contracts for the sale of at least 487,500 ears during the week, but delivery was required within a few hours after picking.

Plaintiff was able to sell 99,600 ears that week, harvested with the aid of such help as plaintiff could get. None was delivered according to contract because he was unable to attend to the deliveries himself, and his men were unable to get the corn ready in time for delivery. All this corn was sold on the open market at a loss. The court laid down the rule of damages as to this portion as the difference between sale price and contract pric

There remained unharvested 700,000 ears. The jury found that as to 391,000 ears contracted for, it was impossible for plaintiff, because of his injuries, to operate his project, and that the business was of such a nature that it was impossible for plaintiff to employ anyone else to manage it for him, particularly because of the need for immediate action. As to this item, the court charged that plaintiff could recover the difference between the contract price and the cost of handling and delivery.

Defendant objected to this testimony, on the ground that plaintiff could not recover for loss of profits, and that plaintiff could recover only the value of his services, as determined by what he could hire someone to do the work.

The court stated the general rule that only compensatory damages, ascertained with reasonable certainty, may be recovered, but the fact that they are based on loss of profits per se, does nc bar recovery.

The court cites two cases as controlling: In Galanis v. Simon 222 App. Div. 330, Judge Hubbs said the admissibility depended on "whether the plaintiff belongs to a class where his income depends on his personal skill....in the particular business in which he is engaged, or whether he is engaged in a line of work which could be done by someone else who could be hired to take his place." In Walsh v. N.Y.C.& H.R.RR. Co., 204 N.Y. 58, it was stated "where there is but a small amount of invested capital which was merely an incident or vehicle to the performance of services which were practically personal in their nature, the evidence to which objection has been made would be admissible."

The court says that the facts bring it within these principles; that plaintiff's business was specialized and depended upon his personal effort, and that time was of the essence in these contracts. It further says that the evidence shows that no one else could be procured who could do this work. It is pointed out that the damages sought are not based on the general profits from the business (as in the Galinis case) but rather the loss of profits on specific contracts.

As to the question of capital, Judge Rippey states that "the evidence shows nothing more than a mere incidental investment of capital", thus bringing it within the decision in the Walsh case.

The broad rule as to damages is that they must be (1) certain - which the damages proved here clearly are; (2) within the contemplation of the parties - which is of little importance in a tort action, - and (3) within the rule of avoidable consequences. The court seems satisfied as to this last, because it states that the proof showed plaintiff could hire no one else to do the work.

Looking at this particular case, no one can quarrel with the result, when it is remembered that the law of damages looks to the compensation of the injured party. It seems fairly clear to the writer that unless such proof as was presented was allowed, plaintiff would not be fully compensated. Defendant has admittedly caused this actual loss to the plaintiff, and he should not now be heard to object that plaintiff should not be fully recompensed.

The writer is also of the opinion that this case does not lay down a greatly extended and far-reaching rule of damages. In his opinion, the case is necessarily limited to similar facts. To allow such a recovery, there must be proof of specific contracts for the product, which cannot be filled as a direct result of the plaintiff's injuries; or at most, a sure market at a certain price. It is also necessary that it be practicably impossible to hire a substitute to do plaintiff's work. The fact that time is of the essence is an important factor in this - given even a relatively short time, plaintiff could probably have found a man to do the work required. If a longer time had elapsed between the time of the injury and the harvesting of the corn, the defendant might have been able to show that the plaintiff reasonably could have found someone else to do the work, hired him, and thus rebutted plaintiff's testimony, and confined the measure of damages to a much smaller amount.

R. B. C.

* * * *

AUTO DEALERS DISCOUNT CORP. v. SANTORA, 170 MISC. 635.- "Can a defendant, in an action demanding a money judgment timely raise the question of the jurisdiction of the court by a denial and an affirmative defense in the answer?" That question is answered in the affirmative by the Nassau County Court, in this case, decided March 24, 1939.

There is at least a seeming inconsistency in the decision. The action was in county court and the complaint alleged the jurisdic-

tional fact of defendant's residence. The answer denied residence, affirmatively alleged non-residence, and counterclaimed. At the close of the case the court dismissed the complaint for failure to prove defendant's residence in compliance with Subd. 3 of §67 of the Civil Practice Act. The inconsistency appeared when the court found that it had power to decide the counterclaim.

The court was unable to find authority on the precise question which it put and apparently there is none. But other questions have been considered which might have aided in handling this case.

Generally, lack of jurisdiction of the person is waived by a general appearance. Service of an answer constitutes such general appearance. A notice of appearance and an answer reserving the right to object to jurisdiction have both been held to be waivers. (Gardner v. Condon, 117 Misc. 97; Mahaney v. Penman, 1 Abb. Prac. 34). But these cases did not determine whether the residence of the defendant affected the power of the court itself.

The Appellate Division in two Departments has held that it is a question which goes to the power of the court and can not be waived. (Levine v. Borden's, 179 App. Div. 921; Wachtel v. Diamond, 215 App. Div. 15) It is true that these decisions may be affected by the amended §67 as to corporations within the county, but the underlying determination remains the same. In Gardner v. Condon, supra, it was stated that, "It is now well settled law that the county court may acquire jurisdiction over the person of the defendant even though he be a non-resident of the county." But the cases cited are those such as Meyers v. American Locomotive Co., 201 N.Y. 163, which give rise to that inference while deciding only that a resident defendant by appearing waives failure to allege the jurisdictional fact in the complaint.

Assuming the court was correct in dismissing the complaint because it had no jurisdiction of defendant, how could it at the same time, assert jurisdiction on the counterclaim in the same action, thereby openin_ the court to a non-resident while denying it to a resident? And assuming that the counterclaim did give the court jurisdiction of the defendant how can the court separate therefrom the answer which is a part of the same act and instrument? It would never be said that a party may choose to give the court jurisdiction of only such matters as may benefit him. And yet the court said, "In one breath defendant says that the court has no jurisdiction over the defendant and in the next he asks affirmative relief by way of counterclaim. Can he have his cake and it it, too? In this case we believe he can."

It would seem that the court either had jurisdiction for all purposes or else for none. But this case is apparently the only attempt to determine the question and, no doubt, is entitled to some weight until reversed or overruled. At least, it would appear to be a good case for defendants to urge the court to follow should the occasion arise.

J. W. M.

UNIV. OF ARIZONA COLLEGE OF LAW LIBRARY
v.8
/Albany law review of recent decisions lw
3 7001 00248 4843